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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 883

ATLANTIC COAST LINE RAILROAD COMPANY, BOSTON AND MAINE CORPORATION, and DES MOINES UNION RAILWAY COMPANY, *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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v.

BROTHERHOOD OF RAILROAD TRAINMEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on September 6, 1967.

Opinions Below

The opinion of the District Court, set forth in Appendix A hereto, is reported at 262 F. Supp. 177. The opinion of the Court of Appeals, set forth in Appendix B hereto, is not yet officially reported but is unofficially reported at 56 CCH Labor Cases ¶ 12,160.

Jurisdiction

The judgment of the Court of Appeals, set forth in Appendix C hereto, was entered on September 6, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where substantially identical proposals for changes in rates of pay, rules or working conditions are served at or about the same time under Section 6 of the Railway Labor Act (45 U.S.C. § 156) by or upon a multiple number of carriers, is the union required by the Act to bargain on a multi-employer basis with the joint representative designated by the group of carriers involved in the common dispute to represent them in negotiations with the union over the dispute?

2. Did respondent fail to comply with the mandate of the Railway Labor Act to exert every reasonable effort to make an agreement settling a dispute over proposed changes in crew-consist rules by refusing to bargain on a multi-employer basis with the joint representative designated by petitioners and other carriers involved in the common dispute to represent them in negotiations with respondent over the dispute?

Statutes Involved

Set forth in Appendix D hereto are Section 3 of Public Law 88-108 (77 Stat. 132) and the pertinent parts of the following provisions of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*): Sections 1 Sixth, 2, 2 First, 2 Second, 2 Third, 2 Ninth, 5 First, 6 and 10.

Statement of the Case

Section 6 of the Railway Labor Act (45 U.S.C. § 156) requires that written notice be given of proposed changes in "agreements affecting rates of pay, rules, or working conditions." The Act established a procedure for resolving such "major" disputes, including conferences on the property of the carrier or carriers involved (45 U.S.C. § 156),

mediation by the National Mediation Board (45 U.S.C. §§ 155, 156), a proffer of arbitration (45 U.S.C. §§ 155, 157, 158), and the possible appointment of an emergency board to investigate the dispute and make recommendations for its settlement (45 U.S.C. § 160). See, generally, *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945). None of the parties to such a major dispute may strike or engage in other unilateral self help to bring about a change in the existing rates of pay, rules or working conditions until it has exhausted the procedures established by the Act both in form and in substance.[1]

The above-stated propositions were not disputed in the court below and we do not believe that they will be disputed here. There also is no dispute about the fact that the respondent union has formally exhausted the procedures established by the Railway Labor Act with respect to Section 6 notices served upon petitioners, subject to the possible appointment by the President of an emergency board. The litigation turns upon the question of whether or not respondent has exhausted those procedures in substance by engaging in the kind of bargaining required by the Railway Labor Act and, more particularly, upon whether or not respondent is required by that Act to bargain on a multi-employer basis under the circumstances involved. Multi-employer bargaining, in which a union bargains on a concerted basis with the joint representative of a group of employers, commonly is referred to in the railroad industry as "national handling" and will be so referred to from time-to-time in this petition. The circumstances relevant to the issue are summarized below.

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[1] See, *e.g.*, *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966); *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 291 (1963); *Elgin, J. & E. R. Co.* v. *Burley*, *supra* at 722-728; *Long Island Rail Road Co.* v. *Brotherhood of Rail. Train.*, 183 F. Supp. 356, 358 (E.D. N.Y., 1960); *American Airlines, Inc.* v. *Air Line Pilots Ass'n. Inter.*, 169 F. Supp. 777, 793-798 (S.D. N.Y., 1958).

1. *Public Law 88-108 and the Award by Arbitration Board No. 282.* This dispute traces back to November 2, 1959, when most of the nation's railroads served respondent and four other unions with Section 6 notices of proposals to change various obsolete work rules, including a proposal to grant management the "unrestricted right" to determine the consist of train crews in road and yard service. Counterproposals were served by the unions on September 7, 1960, including a proposal to require at least one conductor and two brakemen or helpers on all road and yard crews. JA 4-5, 17-18, 36. Following the initial conferences upon the individual properties, all bargaining was engaged in on a multi-employer basis through national handling in accordance with the established practice with respect to such national wage and rule movements, including mediation by the National Mediation Board, an investigation by the Presidential Railroad Commission [2] and an investigation by an emergency board (JA 5-6, 36-37). On this aspect of the dispute, the Commission recommended (JA 306-308) that the parties enter into a national agreement establishing a uniform procedure whereby changes in crew-consist rules could be proposed by a carrier or union and, if no agreement was reached, the matter could be decided by a national "tribunal" pursuant to "criteria" specified in the agreement. Similar recommendations were made by Emergency Board No. 154 (JA 296-297). Although accepted by the carriers, those recommendations were rejected by the unions and the procedures of the Railway Labor Act were exhausted without a settlement of the dispute. In order to prevent a threatened nationwide railroad strike, P.L. 88-108 (77 Stat. 132) was enacted. That statute provided for arbitration of the crew-consist issue and another

[2] The Presidential Railroad Commission investigated the dispute on an *ad hoc* basis pursuant to an agreement of the parties, and is not a normal adjunct of the Railway Labor Act's procedures.

issue involving the use of firemen by an arbitration board (commonly known as Arbitration Board No. 282) comprised of two members designated by the carriers, two members designated by the unions and three neutral members designated by the President.

After noting that train crew consists currently were governed by local rules and had never been the subject of a national rule, Board 282 found that this "myriad of local arrangements has led to numerous inconsistencies in the manning of crews" that "some of the existing rules, originating as they did more than a half-century ago, are anachronistic and do not reflect the present state of railroad technology and operating conditions," and that there was evidence of "overmanning" under those rules and less persuasive evidence of "undermanning" on some assignments. *Opinion of Neutral Members*, 41 Labor Arbitration 680, 693-694 (1963). The basic problem before the Board was how best to remedy this deplorable situation. Board 282 rejected the proposal by the unions for a uniform national rule requiring at least two brakemen or helpers on each crew. The Neutral Members concluded that such a "national prescription of crew size would be wholly unrealistic" because the "consist of crews necessary to assure adequate safety and to prevent undue workloads must be determined primarily by local conditions," which varied widely. *Id.*, at 694. Thus, the unions' proposal was "unsatisfactory" in that it "fails to give consideration to local conditions," as well as because "it provides no method for correction of overmanning . . ." *Id.*, at 694-695. While the carriers' proposal for a national rule giving management discretion to determine crew consists "would certainly permit local determination and consideration of the many factors affecting the adequacy of crew size," the Neutral Members also rejected that proposal

because of their belief that the "employees involved . . . are entitled to more protection than is provided by [the carriers'] assurances of good faith" and their doubts as to whether "a ruling favoring the [proposal of] the carriers would constitute adequate compliance with the statute creating this Board." *Id.*, at 694.

Section 3 of P.L. 88-108 required Board 282 to "give due consideration to those matters upon which the parties were in tentative agreement." The parties had reached a large measure of tentative agreements upon a national agreement establishing procedures for resolving disputes over proposed changes in crew consist pursuant to national guidelines or criteria to be specified in the agreement. Board 282 concluded that this approach, which had been recommended by the Presidential Railroad Commission and the emergency board, was the most desirable one, and its Award, "[e]xcept for minor modifications, . . . reflects each of these tentative agreements, both in matters of approach and in matters of substance." *Id.*, at 696. Accordingly, Article III of the Award (JA 342-348) established a uniform national procedure whereby a carrier or union could serve written notice of proposed changes in rules requiring the use of a stipulated number of trainmen, the parties were required to confer upon such proposals and attempt to reach agreement through the application of national guidelines specified in the Award, and, if no agreement was reached, the matter could be submitted by either party to a special board of adjustment for binding decision in accordance with those guidelines. No trainmen could be discharged pursuant to the Award, and trainmen in active service as of the effective date of the Award were to be retained until removed from employment by natural attrition. Pursuant to Article III, respondent entered into some 95 agreements with various carriers and some 96 awards were rendered by special boards of adjustment.

Most of those agreements (including one entered into with petitioner Des Moines Union R. Co.) and awards (including awards obtained by the other two petitioners) permitted the use of less than two brakemen or helpers on some or all of the crews involved. JA 7-8, 37-38, 327-329.

2. *Service of the 1965 Section 6 notices and related events.* Under the direction of its President, Mr. Charles Luna, who considered Award 282 to be "obnoxious" (JA 244), respondent embarked upon a campaign to eliminate all of the changes in crew-consist rules brought about pursuant to the Award. One aspect of that campaign, which has been the subject of other litigation in the courts below, was to press a legal contention that the rules and agreements in effect prior to the Award automatically were restored when the Award expired on January 25, 1966.[3] Respondent also sought to persuade the carriers, in informal multi-carrier negotiations, to agree to a uniform crew-consist rule requiring at least a conductor and two brakemen or helpers on all road and yard crews (except where a smaller crew was permitted prior to the Award), in exchange for respondent's promise to cease its opposition to repeal of state "full crew" laws and its support of proposals to enact additional such laws.[4] And, respondent commenced the further proceedings under the Railway Labor Act which are the subject of this litigation.

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[3] Respondent's contention has been rejected by both the district court and the court of appeals, and the judgment of the court of appeals in that regard is the subject of a petition for writ of certiorari filed by the Brotherhood of Railroad Trainmen (and another union) now pending in this Court as No. 861. A cross petition for writ of certiorari filed by the carriers with respect to other aspects of that decision is now pending as No. 863.

[4] Some 33 carriers affected by a burdensome New York "full crew" law entered into such an agreement, but most of the carriers refused to do so (JA 168-171, 214-217, 236-237, 402-406). At the direction of Mr. Luna, the 1965 Section 6 notices were not served upon the carriers that entered into that agreement (JA 332).

On June 18, 1965, Mr. Luna instructed respondent's general chairmen (the principle local officers of the unions on the various railroads) to serve Section 6 notices on those carriers which either had obtained or were seeking reductions in crew consist pursuant to the Award (JA 332-337). Those notices, which were drafted by the Grand Lodge (respondent's national headquarters), proposed to establish a rule—effective the day after the expiration of Award 282—requiring the use of at least a conductor and two brakemen or helpers on all road and yard crews. Between June 18 and July 7, 1965, petitioners and more than 80 other carriers were served with such notices, and thus were faced with a demand that they adopt the identical uniform crew-consist rule which respondent had proposed in 1960 and which Board 282 had rejected. In December of 1965, those carriers and more than 20 others served respondent with notices of a counterproposal to the effect that management have discretion to determine the consist of train crews in road and yard service—which was identical to the proposal they had made in 1959. JA 9-10, 38, 53, 103-104, 213.

Petitioners and the other carriers notified respondent that they intended to designate a joint representative to bargain on their behalf in national handling of the dispute, if not settled in the initial conferences upon the properties, and requested respondent to participate in such national handling in accordance with the long-established practice (JA 11-12, 39-40). Apart from the 1965 Section 6 notices involved here, no one who testified at the trial (including Mr. Luna) could recall a single instance in which respondent had refused a request by the carriers for national handling, or in which the carriers had refused a request by respondent for national handling, when substantially identical Section 6 notices had been served at about the same time by or

upon a multiple number of carriers (JA 50, 77, 143, 242-244). The same practice also has been generally followed in negotiations between the carriers and other unions representing railroad employees (JA 4, 36, 387).[5] A report by respondent's Wage and Rules Committee to its 1954 national convention traced this practice of multi-employer bargaining back to 1902 (JA 406-414).

A wide variety of wage and rule proposals have been the subject of national handling. See, *e.g.*, JA 50-51, 73-75, 77-78, 80-81, 234-235, 387-390, 408-414. In addition to the national handling of the 1959-1960 Section 6 notices which culminated in Award 282, crew-consist proposals were handled nationally as a part of national wage and rules movements initiated in 1941, 1944, 1945, 1947 and 1956 (JA 51, 135-136, 242). While those proposals eventually were withdrawn as part of the national settlements of the overall disputes in most instances, Award 282 made a national disposition of the crew-consist proposals involved in the 1959-1960 notices and a 1964 national agreement established a crew-consist rule for self-propelled machines (JA 97, 129, 197-198).

Despite this long-established practice, despite the fact that it had participated in national handling of the identical proposals pursuant to the 1959-1960 Section 6 notices, and despite the fact that the dispute was not settled in the

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[5] On two occasions involving other unions, the carriers initially objected to national handling. With respect to a notice served by the Brotherhood of Maintenance of Way Employees, the carriers were persuaded by the National Mediation Board to participate in national handling and a national agreement was reached (JA 77-78, 115-116, 127). The other instance involved a proposal for a union-shop agreement served by 17 nonoperating unions. The NMB again sought to persuade the carriers to engage in national handling, an emergency board ruled that national handling was appropriate and the eastern carriers negotiated a concerted agreement which formed the pattern for separate agreements entered into by the other carriers (JA 78-79, 112-115, 121-122, 177-179). No union other than respondent has refused to participate in national handling (JA 50, 77, 143).

initial conferences upon the individual properties,[6] respondent refused to participate in national handling of the 1965 Section 6 notices as requested by the carriers (JA 12, 40). Respondent persisted in that refusal even though urged by the National Mediation Board to try to negotiate a national agreement.[7] And, respondent persisted in that refusal even though the carriers offered to retreat from their proposal that crew consists be left to managerial discretion and to attempt to negotiate a settlement which would be based upon the approach recommended by the Presidential Railroad Commission and by Emergency Board No. 154 and adopted by Arbitration Board 282 (JA 93-96, 310-323). In that connection, the carriers assured respondent that they would give serious consideration to any suggestions respondent might make for revision of the national guidelines and procedures established by

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[6] A dispute as to whether the Section 6 notices were premature and did not become effective so as to require conferences, etc., under the Railway Labor Act until after the expiration of the Award is one of the matters being litigated in the litigation referred to in fn. 3, p. 7, *supra*. The district court held that the notices were premature, the court of appeals held to the contrary, and the latter holding is one of those as to which review by this Court is being sought in the petition for writ of certiorari filed in No. 863. The issues in this case are not dependent upon the manner in which that dispute is resolved, however, as respondent did participate in conferences with petitioners and many of the other carriers after expiration of the Award (JA 11, 39, 323-327, 369-376).

[7] In a meeting with the Chairman of the NMB, Mr. Luna and Mr. J. E. Wolfe (then Chairman of the National Railway Labor Conference) agreed (without prejudice to their respective positions concerning national handling) to a series of "test negotiations" on six carriers. The negotiations were to be attended by national representatives of the parties, as well as by local representatives and a mediator appointed by the NMB. Upon conclusion of the "test negotiations," the Chairman of the NMB was to meet with Messrs. Wolfe and Luna at which time they would review what had taken place and attempt to work out a settlement of the entire dispute. JA 88-90, 168, 171-172, 191-194, 228-231. However, Mr. Luna subsequently refused to attend such a meeting (JA 90, 230-231). The Chairman of the NMB also had had an earlier meeting with Messrs. Wolfe and Luna to "see if he couldn't work the thing out between the national figures," and, as of the time of the trial, he was "still trying to do that" (JA 288-289).

Award 282, and that they would be willing to have the consists of all crews, including those established pursuant to the Award, reviewed under any revised procedures and guidelines that might be agreed upon.

Respondent's refusal to participate in national handling of the 1965 Section 6 notices was a deliberate tactical maneuver in its campaign to do away with all that was accomplished under Award 282, whereby respondent sought to put itself in a position to engage in "whipsaw" strikes against one or a few of the carriers at a time so as to force them to agree to the crew-consist rule proposed by respondent, without risking further congressional intervention, while the other carriers were still enmeshed in the procedures of the Railway Labor Act. On November 25, 1963, at about the time Award 282 was issued, Mr. Luna was reported (JA 308-310) to have stated that he was convinced "that the government will never permit a national rail strike," but "would not move to prohibit strikes against single railroads if the other roads were not struck." Hence, thereafter respondent would insist on bargaining with the individual railroads only and would refuse national handling, except with respect to wages, vacations and holidays. "What we are trying to do is stay out of the box we got into in the work rules dispute [arising out of the 1959 and 1960 Section 6 notices]. We want to keep in a position to use our economic strength" (JA 309-310). Mr. Luna testified at the trial that the report is accurate and stated the "policy" which he "adopted" and has "pursued ever since" (JA 246; see, also, JA 219, 233-234, 242-243). Thus, a resolution adopted by respondent's 1964 national convention, after referring to P.L. 88-108 which assertedly had prevented respondent "from exercising its economic rights," resolved that "the 1964 Convention . . . go on record opposing any further

Rules Changes being handled on a National basis. . . ." (JA 223, 415).

As Mr. Luna indicated in his November 25, 1963 statement, however, respondent has been unwilling to give up national handling of other issues in which that procedure was thought to be more favorable to respondent than individual handling (see JA 234-236, 387-388). Among other things, respondent has recently negotiated national agreements with the carriers with respect to health and welfare, accommodations away from home, supplemental annuities, wages and vacations (JA 73-75, 80-81, 223-225). As of the time of trial, the current crew-consist dispute had been the only exception to respondent's participation in national handling of national wage or rule movements.

Moreover, respondent has maintained "national" control over its activities with respect to the 1965 crew-consist notices, even though refusing to bargain on a national basis. Rather than let the general chairmen determine if and when a Section 6 notice should be served and the nature of the proposal to be made, as is respondent's practice in truly local disputes (JA 260-261, 386-387, 390), Mr. Luna (JA 331-341) provided the general chairmen with drafts of the notices to be served, informed them of respondent's policy in that regard, and instructed them that "this movement, although confined to each railroad property, is to be handled under the direction of the President. . . ." (JA 336). Thus, while respondent was refusing to negotiate with the carriers on a national basis, respondent controlled the negotiations by its representatives with the individual carriers in such a manner as to undermine any possibility of reaching local settlements which did not specify the crew-consist rule demanded by respondent's national officers. This is well illustrated by an incident which occurred in the course of the negotiations with petitioner Des Moines Union Railway Company. Respondent's

general chairman on that carrier had approved an agreement under Award 282 for a one-and-one consist on all crews and believed that the "one and one crew was here to stay." Moreover, he was faced with a campaign by a rival union to take over the right to represent trainmen on that carrier. The rival union was using as a selling point the fact that it had negotiated agreements with other carriers providing for increased compensation rather than increases in the size of crews, and many of the employees were "continually" urging him to make a similar proposal to the carrier. The general chairman requested permission from Mr. Luna to make such a proposal, but was instructed that it was against "Brotherhood Policy." Consequently, the general chairman did not make such a proposal, stood firm upon the demand for a one-and-two rule, and concluded that the dispute would have to be settled at the national level through national handling. JA 150-167, 327-330, 376-377, 416-417.

3. *The decisions below.* After respondent rejected (although the carriers accepted) a request by the National Mediation Board that the dispute be submitted to arbitration, the Board terminated its services with respect to petitioners on October 4, 1966 (JA 13, 41). Petitioners thereafter filed their complaint for a declaratory judgment and injunctive relief (JA 2-34),[8] and a trial upon the merits ensued. The findings of fact by the trial judge, as well as his conclusions of law, are set forth in the opinion appended hereto as Appendix A.

Upon the basis of the record developed at the trial, the trial judge found, among other things, that: "[f]or many years it has been the practice in the railroad industry to handle on a national basis the adjustment of labor disputes

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[8] The jurisdiction of the District Court was grounded upon 28 U.S.C. §§ 1331, 1337, 2201 and 2202.

that affect more than a single carrier" (App. A, at 12a); that "numerous topics" have "been treated in this manner" right up to the time of trial (*id.*, at 12a); that whenever "identical notices [are] served on a number of carriers, at about the same time, the subject matter is peculiarly fitting for what is called in the industry 'national handling' and becomes a 'national issue'" (*id.*, at 12a); that the National Mediation Board has encouraged national handling and discouraged "attempts to negotiate such matters individually with each railroad concerned" (*id.*, at 12a); that the present dispute is a "continuation of the dispute commenced by service of notices in 1959 and 1960," which "was conducted on a nation-wide basis" (*id.*, at 12a); that "the current stage of the dispute has been handled nationally on both sides, except that the Union declined to face the carriers as a group" (*id.*, at 13a); that respondent's "purpose in avoiding negotiations on a national basis in this instance" was to further Mr. Luna's "plan . . . to isolate every railroad and call separate strikes, one at a time, in order to obtain his ultimate objective, step by step" (*id.*, at 13a-14a); that respondent continues to engage in national handling of other subjects (*id.*, at 14a); and that respondent's argument "that the size of the crews is particularly a local matter . . . is contradicted . . . by the very actions of the Union" (*id.*, at 14a).

The District Court concluded, among other things, that "the Railway Labor Act by its express provisions authorizes carriers to act jointly as a group in negotiating matters initiated by notices under Section 6" (*id.*, at 14a), which "consideration is alone sufficient to sustain the position of the carriers" (*id.*, at 15a); and that respondent's refusal to bargain on a multi-employer basis also is contrary to the obligation imposed by the Railway Labor Act "to negotiate in a genuine manner" (*id.*, at 18a)—*i.e.*, in "good faith"—as is shown by decisions under the Labor

Management Relations Act which imposes a similar obligation on employers and unions subject to that Act (*id.*, at 15a-18a). Consequently, the District Court entered a judgment declaring the right of the carriers to national handling of the dispute created by the 1965 Section 6 notices and enjoining respondent from striking petitioners unless and until respondent participates in such national handling and otherwise exhausts the procedures of the Railway Labor Act (JA 448-450).

The Court of Appeals reversed. While that court did not accept respondent's contention that national handling can never be required and is entirely dependent upon mutual agreement of the parties, it also rejected the trial court's interpretation of the Railway Labor Act and petitioners' contentions in that regard (App. B, at 23a). The Court of Appeals referred to petitioners' contention (see pp. 29-30, *infra*) that carriers involved in a common dispute have a right, under Sections 1 Sixth and 2 Second of the Act, to designate a joint bargaining representative and to bargain on a multi-carrier basis (App. B, at 23a), and to the trial court's approval of that contention (*id.*, at 24a), but did not explain the reasons for its rejection of that contention.

With respect to petitioners' alternate contention (see pp. 30-34, *infra*), also approved by the trial court, that respondent's refusal to participate in national handling of the current dispute violated the requirements in Section 2 First of the Act that it "exert every reasonable effort" to make an agreement disposing of the dispute—*i.e.*, that it bargain in "good faith"—the Court of Appeals stated (App. B, at 25a-26a) that:

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does

not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue."

The "history and realities of crew consist bargaining" relied upon by the Court of Appeals in reaching that conclusion were the rejection by the Presidential Railroad Commission and Arbitration Board No. 282 of the very uniform one-and-two crew consist rule which petitioner is now demanding because such a "national prescription of crew size would be wholly unrealistic" (App. B, at 25a). The Court of Appeals ignored the fact that the Commission and Board did not consider a national crew-consist agreement establishing procedures and guidelines for determining crew consists to be unrealistic, and that such an agreement had been recommended by the Commission and such national procedures and guidelines adopted by Board 282; the Court of Appeals ignored the fact that the carriers had urged that this very dispute be settled upon the basis of such an approach and had never urged or proposed a "national prescription of crew size;" and the Court of Appeals disregarded the fact that in the past the parties consistently had bargained on a multi-employer basis whenever substantially similar proposals were served at about the same time by or upon a number of carriers, since such uniform demands in itself sufficed to establish that a national, rather than a local, dispute was involved.

4. *The effects of strikes by respondent.* If the decision below is not reviewed by this Court the injunction entered by the trial court will be vacated and respondent no longer will be restrained from striking petitioners over its demand for a one-and-two crew consist rule. In addition, the National Mediation Board has terminated its services with respect to 16 other carriers, who filed a companion case in the District Court. *Chesapeake & Ohio Railway Company, et al.* v. *Brotherhood of Railroad Trainmen,* Civil Action No. 3180-66. By agreement of the parties, the record in this case was made part of the record in that case and the District Court entered a preliminary injunction, on February 13, 1967, similar (except for its preliminary nature) to the judgment entered in this case upon the basis of the opinion, findings and judgment in this case.[9] Further proceedings in the *Chesapeake & Ohio* case have been stayed pending disposition of this case, but immediate strikes of the 16 carriers involved therein also could occur if the decision by the Court of Appeals in this case is not reviewed by this Court.

The effect of a strike of petitioner Atlantic Coast Line Railroad Company upon that carrier and upon the public was outlined in an affidavit filed with the court below.[10] It is there stated that Atlantic Coast Line, which then operated over 5700 miles of track in six southeastern states, would lose gross operating revenues in the amount of about $600,000 per day, that

[9] Shortly after filing the complaint in this case, petitioners obtained a temporary restraining order against strikes by respondent. At the suggestion of the trial court, the parties agreed to bypass the preliminary injunction stage in this case and go directly to trial, and respondent agreed not to strike either petitioners or the plaintiffs in the *Chesapeake & Ohio* case pending entry of the court's judgment after that trial. The Court of Appeals stayed its mandate pending action by this Court upon this petition and, if granted, upon the merits, so that the injunctive relief granted by the trial court currently remains in effect.

[10] Affidavit of L. T. Andrews, filed January 30, 1967.

many passengers and shippers are dependent upon the carrier for rail service, and that a number of military installations are dependent upon the carrier for rail service including the Military Ocean Terminal at Sunny Point, Leland, North Carolina, from which a large volume of ammunition is shipped to the United States forces in Viet Nam. Since that affidavit was filed, the Atlantic Coast Line has merged with the Seaboard Air Line Railroad Company to form the Seaboard Coast Line Railroad Company. In approving the merger, the Interstate Commerce Commission found that the merged railroad would operate 12,390 miles of track in the six-state area, constituting more than 54% of the total railroad mileage in that area, and that the Southern Railway System—which also may be subject to a strike by respondent—operates about 34% of the total railroad mileage in that area.[11] A similar affidavit,[12] filed with respect to petitioner Boston and Maine Corporation, demonstrates that a strike of that carrier would disrupt commuter service for some 12,000 passengers daily in the Boston area, would disrupt freight service in Massachusetts, New Hampshire, and parts of Maine, Vermont and New York, and would deprive the carrier of daily freight revenues in the amount of approximately $140,000.

The 16 carriers involved in the companion *Chesapeake & Ohio* case include the Chesapeake & Ohio Railway Company, the Gulf, Mobile & Ohio Railroad Company, the Missouri Pacific Lines (five affiliated carriers), the Southern Railway System (eight affiliated carriers), and the Union Pacific Railroad Company. Affidavits filed with the Dis-

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[11] *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 163 (1963), upheld, *Florida East Coast Railway Company* v. *United States*, 259 F. Supp. 993 (M.D. Fla., 1966), aff'd *per curiam*, 386 U.S. 544 (1967), prior opinion, 242 F. Supp. 14 (M.D. Fla., 1965), rev'd, 382 U.S. 154 (1965).

[12] Affidavit by William J. Ahearne, filed January 30, 1967.

trict Court in that case disclose that the railroad systems involved therein are among the largest in the United States, and that strikes of those railroads would have disastrous consequences to the railroads and to the public. Among other things, it was estimated that the loss of operating revenues would approximate $1,100,000 per day for the Chesapeake & Ohio, $250,000 per day for the Gulf, Mobile & Ohio, $1,000,000 per day for the Missouri Pacific Lines, several hundred thousand dollars per day for the Southern Railway System, and $1,600,000 per day for the Union Pacific. Many commuters and other passengers, shippers and military installations would be deprived of rail service.[13]

Moreover, there are some eighty odd other carriers which were served with respondent's 1965 Section 6 notice or which served respondent with the carriers' counterproposal. While the National Mediation Board has not yet terminated its services with respect to those carriers, they may be in a position to resort to self help so as to preserve a common front in the common dispute, in which event the strike almost certainly would become nationwide in extent. See p. 33, fn. 24, *infra*. But even if that cannot be done until after the Mediation Board terminates its services, the nation will be facing the prospect of a series of strikes as such terminations occur if the decision below is left standing.

Reasons for Granting the Writ

This case is important in its own right both to the parties and to the public. The decision below could result in disastrous railroad strikes designed to coerce the railroads into accepting rules for the manning of train crews which

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[13] See the affidavits (filed January 23, 1967) of James E. Wolfe; George M. Seaton, Jr. (¶34); Thomas P. Gleason (¶27); Maynard E. Parks (¶33); L. G. Tolleson (¶28); and Glen L. Farr (¶32).

have been condemned by every impartial agency that has considered the matter despite the fact that no bargaining has yet occurred in an effort to reach an overall national settlement such as one which would build upon the foundation provided by the Award of Arbitration Board No. 282. But the importance of this case transcends the situation immediately involved. The issues as to whether and in what circumstances multi-employer bargaining may be required under the Railway Labor Act go to the very heart of collective bargaining in the railroad industry.[14] The decision below would leave the established practice of many years standing without a firm statutory basis and, we believe, would unsettle labor relations in the industry for years to come. While the decision below does recognize that national handling may be required in some circumstances, it is clearly wrong in rejecting the basic criterion of similar demands served by or upon a multiple number of carriers at approximately the same time.[15]

A. *This Case Involves Important Issues of Federal Law Which Have Not Been, But Should Be, Settled by this Court.*

Bargaining between the union and the individual carriers has failed to resolve the dispute created by the 1965 Section 6 notices. Subject to the possible appointment by the Presi-

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[14] And also in the airline industry which is subject to the pertinent provisions of the Railway Labor Act by reason of 49 Stat. 1189, 45 U.S.C. § 181.

[15] The court below stated (App. B, at 23a) that its "more individuated approach" is "akin to that suggested in the brief of the United States appearing as *amicus curiae* . . . ." In that brief, however, the United States urged—as did respondent—that multi-carrier bargaining is dependent upon the consent of all parties thereto. While we disagree with that contention, we note that the unusual action of the Solicitor General in authorizing the filing of an amicus brief (at the instigation of the Department of Labor, as we understand) in this case while before the Court of Appeals reinforces our view as to the importance of the issues involved.

dent of an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160), therefore, serious railroad strikes may be expected to ensue if the decision below is left standing. We have summarized some of the effects of such strikes at pp. 17-19, *supra,* but the matter really is self evident. The nation's transportation system will be drastically crippled, depriving important military installations and defense industries of essential rail transport to the detriment of our military effort in Viet Nam and our defense posture generally, and many other shippers and passengers will be similarly deprived. Each day that such strikes continue, the railroads will be deprived of many millions of dollars in revenue and their employees—most of whom are not members of respondent—will be deprived of wages.

While the immediate detrimental effects of such strikes to the carriers and the public are relatively obvious, their long-term detrimental effects—if successful—may not be as readily comprehended but also will be of great importance. The carriers will be coerced into adopting a crew-consist rule which was rejected by the Presidential Railroad Commission, by Emergency Board No. 154, by Arbitration Board No. 282, and by many special boards of adjustment established under Award 282, because it does not reflect actual manpower needs in the light of safety, work load and other relevant considerations, and will result in the use of many unnecessary employees. This can only lead to increased costs to railroads who already are financially hard pressed and thus to higher rates to the public.

We cannot assure the Court, of course, that multi-carrier negotiations will result in an agreement settling the dispute without resort to disastrous strikes. The Railway Labor Act does not compel agreement in multi-carrier bargaining just as it does not do so in individual bargaining.

Rather, the Act establishes procedures that "are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). But, as we have noted, bargaining between the union and the individual railroads has failed, and multi-carrier bargaining may succeed in peacefully resolving the dispute if given a fair opportunity. The carriers and the public should not be deprived of that opportunity if it is afforded by the Railway Labor Act, as we believe.

As the National Mediation Board has observed, "[p]ast history has indicated that the procedure of handling wage and rule movements by concerted action generally results in agreement between the labor organization and carriers without resorting to the use of economic force." Twenty-Sixth Annual Report (1960), at 9. Efforts to reach a compromise in multi-carrier bargaining are not hampered by the fears of a particular carrier that it may obtain less favorable terms than a competitor or of a particular union representative that he may not do as well as the union representative on some other carrier, and the limited number of mediators assisting the Mediation Board can be more effectively employed. See JA 81-85, 225, 234-236. The "pressures" of public opinion, which the Congress contemplated would play a prominent role in persuading the parties peacefully to settle labor disputes under the Railway Labor Act,[16] can be more effectively brought to bear in national negotiations. See Lecht, *Experience under Railway Labor Legislation* (1955 ed.), at 168. This is well illustrated by the belief of respondent's president that the Congress, if national negotiations did not result in a peaceful settlement, would intervene by enacting special legis-

[16] See *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725 (1945).

lation, such as P.L. 88-108. That consideration, which affects the carriers as well as the unions, obviously could be a potent "practical consideration" in favor of the compromises necessary to reach a voluntary agreement so as to avoid the uncertainties attendant upon congressional action.

Furthermore, it seems apparent that the chances of reaching a peaceful settlement will at least be enhanced if consideration is given to the possibility of building upon the existing framework. In the crew-consist area, that existing framework is provided by Award 282 which is national in scope. The approach adopted in Award 282, whereby national procedures and guidelines are established for application on the local properties, not only was approved by the Neutral Members of Board 282, but was recommended by the Presidential Railroad Commission and Emergency Board No. 154. The carriers have assured respondent in writing that they are willing to consider any modifications in those procedures and guidelines that respondent may propose, and to attempt to work out a new national agreement which will reflect any modification that the parties deem to be desirable in the light of their experience under Award 282 and other relevant considerations. If national negotiations are had, this approach can at least be fully explored and we believe that it offers the best hope for a peaceful settlement.[17]

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[17] To be sure, the parties were unable to reach an agreement embodying such an approach in the negotiations over the 1959-1960 Section 6 notices. But they also were unable to agree upon any other approach, including the uniform one-and-two rule proposed then and now by respondent, and they came close to agreeing upon such national guidelines and procedures. Indeed, the crew-consist provisions of Award 282 for the most part are based upon matters tentatively agreed upon by the parties in their negotiations. See, p. 6, *supra*. Moreover, those negotiations were complicated by the fact that many other issues were involved, while the 1965 Section 6 notices are limited to the crew-consist issue. The NMB recently observed that the "experience in [national] handling has been generally satisfactory

This Court granted certiorari at the instance of the unions (including the respondent here) to review a decision that the Section 6 notices served by the carriers in 1959, including a proposal similar to that made in the carriers' 1965 Section 6 notices, were valid and that the procedures of the Railway Labor Act had been exhausted with respect to such notices so as to permit a resort to self help, subject to the possible appointment of an emergency board. *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963). We submit that the justification for a grant of this petition, even if considered only in terms of the situation immediately involved, is more substantial in view of the circumstances discussed above.

The importance of this case, moreover, is not limited to the crew-consist dispute which is immediately involved. It is difficult to conceive of an issue more important to the administration of the Railway Labor Act than whether, and the circumstances in which, multi-employer bargaining may be required under that Act. The statutory foundations for what heretofore has been the established procedure for resolving national wage and rule movements, such as that initiated by respondent with its 1965 Section 6 notices, are drawn into question. The importance of that procedure to the success of collective bargaining in the railroad industry has been affirmed on numerous occasions.[18]

Thus, in its Third Annual Report (1937), the National Mediation Board stated, at p. 3, that:

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when the requests are relatively uniform as to wages or involve only a few rules proposals," while notices involving "numerous proposals for changes in rules" are more difficult to settle. Thirty-Second Annual Report (1966), at 10.

[18] It also has been recognized that multi-employer bargaining contributes to the stability of labor relations and is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" in other industries. *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 95 (1957).

> "The faculty of the railroads collectively and the representatives of their employees to hold joint conferences and enter into understandings constructively disposing of problems affecting the industry and its employees as a whole is indicative of the steady basic improvement which has been taking place in recent years in the attitude of railroad managements and railroad labor organizations toward one another. The consummation of such nation-wide understandings is, in the opinion of the National Mediation Board, deserving of all possible encouragement and commendation. Insofar as other problems may arise common to all the railroads, regionally or nationally, and their employees, it is the hope of the Board that they may likewise be considered in joint conference and disposed of through understandings regional or nation-wide in scope."

And see, *e.g.*, Thirty-Second Annual Report (1966), at 10; Twenty-Sixth Annual Report (1960), at 9. Consistent with this attitude, the NMB sought to persuade respondent to participate in national handling of the current crew-consist dispute.[19] See p. 10, *supra*.

In the so-called Union Shop Case, counsel for 17 unions representing the carriers' nonoperating employees pointed to the fact that "every national movement, whether for wages or rules changes, has been handled and finally disposed of on a national basis" since 1931, and urged that:

> "As a result of the foregoing pattern consistently

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[19] The NMB has no enforcement powers as such, and can only attempt to persuade the parties to comply with the bargaining requirements of the Railway Labor Act. See Fifteenth Annual Report (1949), at 2. If a party refuses to do so and mediation fails "to bring about an amicable settlement," the Board's only recourse is to make a proffer of arbitration and terminate its services. 45 U.S.C. § 155 First.

followed in every national movement for twenty years, national handling has become firmly established as a part of the necessary procedure for the handling of national movements. It has uniformly been recognized by both sides as essential if collective bargaining of a uniform national proposal is to function, else the bargaining process cannot hope to dispose of such an issue in anything like an orderly fashion. The refusal to bargain concertedly in such a situation thus amounts simply to a refusal to have the only type of collective bargaining that can effectively dispose of the issues. . . ."

Brief for the Seventeen Cooperating Railway Labor Organizations, at 79. Emergency Board No. 98, to which that brief was addressed, agreed. See p. 35, *infra*.

Many unions continue to agree with that view. One of the most widely known railway union leaders is Mr. George E. Leighty. As he testified this year before a congressional committee, he is chairman of the Railway Labor Executives' Association, president of the Transportation-Communications Employees Union, chairman "of the national negotiating committee of the cooperating nonoperating railway unions," has about 50 years experience in the railroad industry, and knows "this industry as well as any man, not only from the standpoint of its labor relations, but from the standpoint of its operating practices." Hearings on H.J. Res. 559 before the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., at 217. In his testimony, Mr. Leighty noted that respondent and one other union "have begun to move away from national handling," although of the "42 national movements for improvements initiated by the five operating organizations and the 11 principal nonoperating organizations" in the last 15 years "39 were settled without a strike and without

the kind of 'crisis' that bring Congress into the picture" (*id.*, at 227-228). In response to an inquiry as to whether it is practical for the unions and management in the railroad industry "to negotiate on other than a nationwide basis," Mr. Leighty testified (*id.*, at 256):

> "I do not consider it practical. You would have to handle 200 to 300 separate negotiations in the railroad industry on each movement. I don't believe it would work out."

In Mr. Leighty's informed view, "insofar as national negotiations are concerned, as they have worked out in the past, it has been advantageous to both of us. I think it has helped us materially; it has helped the carriers materially. It has prevented, in my opinion, a great deal of chaos." *Id.*, at 257.

As long as national handling of national wage and rule movements was generally accepted either through a belief as to its desirability or through a belief that it could be required under the Railway Labor Act, issues as to the statutory basis of that practice were seldom raised despite their importance. But, as this case demonstrates and as Mr. Leighty testified, respondent has "begun to move away from national handling." If respondent is successful in doing so, as it will be if the decision below stands, other unions will feel the pressure to do likewise. Whatever may be the views of their leaders as to the desirability of national handling in general, there are bound to be specific situations in which it is thought that a refusal of national handling will result in overriding tactical advantages. Nor will the carriers be immune from this pressure. There will be national movements, like the Union Shop Case, in which the tactical advantages of refusing national handling will be on their side. There is grave danger that the broad view

that multi-carrier bargaining in the long run benefits both management and labor, as well as the public, will be lost sight of because of the urge to seize an immediate advantage.

We think it clear that multi-employer bargaining is beneficial to harmonious labor relations and thus serves one of the fundamental purposes of the Railway Labor Act. As the National Mediation Board commented in its Third Annual Report, the ability of the railroads and the representatives of their employees "to hold joint conferences and enter into understandings constructively disposing of problems affecting the industry and its employees as a whole is indicative of the steady basic improvement" in their relations with one another. Exclusively local bargaining upon issues of general concern may adversely affect the employees because of the much greater time required to negotiate the same issue to a conclusion on many railroads, as compared with one national negotiation, and because local negotiations may result in different treatment of employees similarly situated. And, from the carriers' point of view, there can be no justification for relegating the negotiation of common problems exclusively to local handling whenever the unions so insist, particularly in view of the uniform rate regulation to which the industry is subject and the competitive importance of holding costs to a relatively common level. Yet, the decision below would permit just that insofar as this important area of manning train crews is concerned.

In view of the above considerations, we submit that this case raises issues of large importance to collective bargaining under the Railway Labor Act which should be settled by this Court at this time.

B. *The Decision Below Is Erroneous.*

This is not a case in which the decision below is so plainly correct that the Court might appropriately decline to review that decision despite the importance of the issues involved. That proposition hardly needs to be demonstrated since the court below did not cite any authority for its rejection of petitioners' contention that multi-employer bargaining is required when the same proposals are served at the same time by or upon a multiple number of carriers, the trial court reached a contrary result, and respondent's interpretation of the Railway Labor Act also was rejected by the court below. For present purposes, therefore, it seems sufficient to state very summarily the reasons for our view that the decision below is erroneous.

1. Section 1 Sixth of the Act defines "representative" as used therein to mean "any person or persons, labor union, organization, or corporation designated either by a carrier or *group of carriers* or by its or their employees to act for it or them." 45 U.S.C. § 151 Sixth (emphasis added). Section 2 Second provides that all "disputes between a carrier or *carriers* and its or their employees shall be considered, and, if possible, decided, with all expedition, in conferences between representatives designated and authorized so to confer, respectively, by the carrier or *carriers* and by the employees thereof interested in the dispute." 45 U.S.C. §152 Second (emphasis added). On its face, this language plainly authorizes a "group of carriers" to designate a joint representative to bargain with the interested union as representative of the entire group; *i.e.*, in multi-employer bargaining or national handling.

While the court below acknowledged petitioners' argument based upon that express statutory language (which has no counterpart in the Labor-Management Relations Act), no explanation was given for its rejection of the argu-

ment. Respondent conceded that, under Sections 1 Sixth and 2 Second, the carriers have an absolute right to designate a joint representative to bargain on their behalf, but contended that the union is not required to bargain with the joint representative as the representative of the group and may insist that he bargain on behalf of only one carrier at a time.[20] That interpretation would drain the statutory provisions of all meaningful content. The designated representative would not be the representative of a "group of carriers," but merely a person who happens to represent several carriers. There could be no "disputes between . . . carriers and . . . their employees" which "shall be considered, and, if possible, decided, with all expedition, in conferences between representatives designated and authorized so to confer, respectively, by the . . . carriers and by the employees thereof interested in the dispute," but only "disputes between a carrier . . . and its . . . employees," etc.

2. Section 2 First of the Act provides that it "shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain

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[20] Respondent urged that its interpretation is supported by the fact that certifications of a union as the authorized collective bargaining agent, under Section 2 Ninth (45 U.S.C. § 152 Ninth), are on a single carrier rather than a multi-carrier basis. Under the logic of that argument, multi-employer bargaining would not be permissible in any circumstances. Yet, respondent concedes that multi-employer bargaining is proper when both the carriers and union consent thereto, and it could hardly do less in view of the long history of such bargaining. And, the court below plainly did not accept this argument by respondent as it held that multi-employer bargaining may be required in some circumstances. We note that most railway labor unions are "national in scope" in that they represent a class or craft of employees on many carriers rather than on one or a few carriers. *California* v. *Taylor*, 353 U.S. 553, 567 (1967). Moreover, it is the national union, rather than a local lodge, which is the authorized representative. *Childers* v. *Brotherhood of R. Trainmen, Etc.*, 192 F. 2d 956 (8th Cir., 1951). Hence, there is nothing inconsistent in certifying unions on a carrier-by-carrier basis and providing at the same time for bargaining by that union with the joint representative of a "group of carriers."

agreements concerning rates of pay, rules, and working conditions . . . , in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. This provision has been construed to impose a duty to bargain in "good faith" similar to that imposed by the Labor-Management Relations Act,[21] although it has been suggested that "the Railway Labor Act imposes a somewhat greater duty to endeavor to reach agreement. . . ." *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, 70 (2d Cir., 1961).

We do not see how anyone can rationally contend that this duty to exert *every* reasonable effort to make and maintain agreements, so as to avoid the interruption of rail transportation by strikes, did not oblige respondent at least to *negotiate* with the carriers on a national basis and *try* to work out a national agreement disposing of the dispute. The parties and the courts were not faced with an either/or choice between local and national handling. Under the established practice, when uniform Section 6 notices are served by or upon a number of carriers, the initial conferences are held upon the individual properties and national handling occurs only if those local negotiations fail. That is all that the carriers requested with respect to the 1965 crew-consist notices. The local negotiations did fail to settle that dispute. While the parties would not be required to reach agreement in such multi-employer bargaining, as we have shown (pp. 21-23,

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[21] See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 721-722, fn. 12 (1945); *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 45, fn. 6 (4th Cir., 1957); *Brotherhood, Etc.* v. *Atlantic Coast Line R. Co.*, 201 F. 2d 36, 39 (4th Cir., 1953); *Long Island Rail Road Co.* v. *Brotherhood of Rail. Train.*, 185 F. Supp. 356, 358 (E.D. N.Y., 1960).

supra) the possibility that an agreement would be reached cannot be rejected out of hand.

The carriers' position in this regard is supported by analogy to decisions under the Labor-Management Relations Act. Unlike the Railway Labor Act (if we are correct in our interpretation of Sections 1 Sixth and 2 Second, pp. 29-30, *supra*), that Act does not expressly provide for multi-employer bargaining, but it does require the employers and unions to bargain in "good faith" (29 U.S.C. § 158). Both the NLRB and the courts have held that where a practice or history of multi-employer bargaining has been established, neither an employer or union may withdraw therefrom (without consent of the other side) except in a timely and unequivocal manner; otherwise, an employer or union is guilty of an unfair labor practice for refusing to bargain in "good faith" if it attempts to bargain separately or to engage in "whipsaw" strikes against one or a few members of the multi-employer group.[22] In addition, if one or a few members of such a multi-employer group are subjected to "whipsaw" strikes, the other members may lockout their employees and operate with temporary replacements, and may otherwise engage in such self help as may be necessary "to preserve the multiemployer bargaining unit from the disintegration threatened by the whipsaw strike."[23] The facts and circumstances in the railroad industry permit application of these same principles.

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[22] *E.g., Detroit Newspaper Publishers Association* v. *N.L.R.B.*, 372 F. 2 569 (6th Cir., 1967), enforcing *Evening News Association*, 154 N.L.R.B. 1494 (1965); *Publishers' Association of New York City* v. *N.L.R.B.*, 364 F.2d 293 (2d Cir., 1966); *Universal Insulation Corp.* v. *N.L.R.B.*, 361 F. 2d 406 (6th Cir., 1966); *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir., 1966); *Int'l Union of Operating Engineers, Local 825*, 145 N.L.R.B. 952 (1964); *Westchester County Executive Committee, Etc.*, 142 N.L.R.B. 126 (1963).

[23] *Labor Board* v. *Brown*, 380 U.S. 278, 282 (1965); *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957); *N.L.R.B.* v. *Great Falls Employers' Council*, 277 F. 2d 772 (9th Cir., 1960).

For more than 30 years prior to the instant dispute, the carriers and respondent bargained on a multi-employer basis whenever substantially identical Section 6 notices were served at about the same time by or upon a number of carriers. We doubt if the duty to exert "every reasonable effort" to reach agreement would permit even a timely and unequivocal withdrawal in view of that long-established practice, but certainly no less should be required.[24] Under the cases arising under the LMRA, a withdrawal is untimely if negotiations for a new contract have commenced. See the cases cited in fn. 22, *supra*. And, an "attempted withdrawal cannot be accepted as unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining." *Retail Associates, Inc.*, 120 N.L.R.B. 388, 394 (1958); see *N.L.R.B.* v. *Jeffries Banknote Company*, 281 F.2d 893, 896 (9th Cir., 1960); *Pacific Coast Association*, 163 N.L.R.B. No. 129 (1967); *Jahn-Tyler Printing & Pub.*

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[24] The NLRB has long held that an employer could withdraw from multi-employer bargaining if it did so in a timely and unequivocal manner, but first permitted such withdrawals by a union in *Evening News Association*, 154 N.L.R.B. 1494 (1965), over a vigorous dissent. In enforcing that decision because of the discretion conferred upon the Labor Board in such matters, the Sixth Circuit expressed concern because the right to withdraw was not more restricted since "in our judgment Board policies should be framed substantively to bolster the multi-employer unit as an instrument of national policy." *Detroit Newspaper Publishers' Association* v. *N.L.R.B.*, *supra* at 572. That court also expressed the view that the employers could continue to protect their common interests through lockouts, despite the union's withdrawal. *Ibid.* Most commentators have criticized the *Evening News* decision on substantially the same basis, and consider the right to defend against whipsaw strikes by lockouts in such circumstances to be essential. Note, 53 Va. L.R. 1189 (1967); Note, 1967 Duke L.J. 558 (1967); Note, 44 Tex. L.R. 1047 (1966); Note, 41 N.Y.U. L.R. 651 (1966). The trial court below (App. A, at 17a) doubted whether a lockout would be permissible under the Railway Labor Act. We note, however, that *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238 (1963), demonstrates that in at least some circumstances a carrier may protect itself against union tactics by resorting to self help prior to exhausting the procedures of the Railway Labor Act.

Co., 112 N.L.R.B. 167, 169 (1955). Respondent has made neither a timely nor an unequivocal withdrawal from multi-employer bargaining. It participated in national handling of the same dispute as it arose under the 1959-1960 Section 6 notices, did not notify the carriers that it was withdrawing from national handling when it served its 1965 notices (J.A. 339-340), and has since participated in national handling of other issues.

3. The relevant prior decisions under the Railway Labor Act also support petitioners. In holding that the Act was intended to apply to a railroad owned by a State, this Court noted that collective bargaining in the railroad industry "has often taken on a national flavor," and concluded that the "Congress, aware of these characteristics of labor relations in the interconnected system which comprises our national railroad industry, intended that collective bargaining, as fostered and protected by the Railway Labor Act, should apply to all railroads. Congress no doubt concluded that a uniform method of dealing with the labor problems of the railroad industry would tend to eliminate inequities, and would promote a desirable mobility within the railroad labor force." *California* v. *Taylor*, 353 U.S. 553, 567 (1957).

In *Kennedy* v. *Long Island Railroad Company*, 211 F. Supp. 478 (S.D.N.Y., 1962), aff'd, 319 F.2d 366 (2d Cir., 1963), the Brotherhood of Railroad Trainmen contended that a strike insurance agreement entered into by many railroads violated the Act because, among other things, "it introduced an element of multiparty bargaining without the consent" of the Brotherhood (211 F. Supp., at 488). Chief Judge Ryan rejected that contention on the alternative grounds that the agreement did not constitute multiparty bargaining and that, if it did, "[m]ulticarrier bargaining of labor demands, referred to as regional and

national handling, has been and is (since the Act) the customary method of collective bargaining" (211 F. Supp., at 488). This aspect of his decision was affirmed by the Second Circuit upon the basis of the opinion below (319 F.2d, at 372, fn. 7).

We have referred (pp. 25-26, *supra*) to the argument on behalf of 17 unions before Emergency Board No. 98 that national handling of their union-shop proposals, all of which were substantially identical and served at about the same time, could and should be required. The emergency board agreed, stating, among other things, that:

> "Both parties . . . have repeatedly and consistently recognized national handling as an essential procedure for disposing of national movements on a great diversity of issues covering not merely wages but a wide variety of rule changes including vacations, hours, starting times, craft lines, the 40-hour week, loss of job on railroad consolidations, and, in 1943, a union-shop proposal. In the face of such a firmly established and recognized pattern of collective bargaining on a national scale a finding that a demand for such a procedure in this case was improper could not be made."

Report of Emergency Board No. 98, at 57 (1952).

No prior decision of which we are aware has held or even intimated that national handling may not be required under the Railway Labor Act, where similar proposals are served at or about the same time by or upon a number of railroads.

4. The court below recognized that "good faith bargaining" may include an obligation to bargain on a multiemployer basis, and stated that whether multiemployer bargaining "is . . . obligatory will depend on an issue-

by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." This appears to mean that the courts are to determine whether or not multi-employer bargaining is "appropriate" as to any particular proposed change in rates of pay, rules or working conditions upon the basis of their views as to whether multi-employer bargaining is "practical" in the light of past experience in bargaining upon the subject of the proposed change. If the courts deem multi-employer bargaining to be "appropriate," then it is "obligatory" with respect to that subject. But if the courts deem multi-employer bargaining to be "inappropriate," then it cannot be required as to that subject even though the identical proposal is made by or to numerous carriers at about the same time, so that a common dispute exists between those carriers and the union.

We agree, of course, with the proposition that the duty "to exert every reasonable effort to make and maintain agreements"—to bargain in good faith—may include an obligation to bargain on a multi-employer basis. The existence of such an obligation may validly turn upon a judgment as to the appropriateness of multi-employer bargaining with respect to the subject matter of a particular Section 6 notice, in the light of past bargaining experience and other relevant circumstances, when the notice is served by or upon a single carrier. We submit, however, that multi-employer bargaining is "appropriate" and "obligatory" in order to comply with the duty to exert *every* reasonable effort to make and maintain agreements, whatever the subject matter of the Section 6 notice may be, when that notice is served at about the same time by or upon a multiple number of carriers and the dispute is not settled in the initial conferences upon the individual properties. As the trial court found (App. A, at 12a) upon

the basis of an extensive record developed in a lengthy trial, "[w]henever a series of identical notices is served on a number of carriers, at about the same time, the subject matter is peculiarly fitting for what is called in the industry 'national handling'. . . ." This is demonstrated not only by the consistent practice of many years, but also by the fact that the making of uniform proposals with respect to a multiple number of carriers is sufficient in itself to establish that a common problem is involved.

But even if the fact that the same Section 6 notices are served by or upon a multiple number of carriers at about the same time is not sufficient in itself to establish the appropriateness of and need for multi-employer bargaining, we think it plain that the court below erred in its "evaluation of the practical appropriateness of mass bargaining on [crew-consist proposals] and of the historical experience in handling any similar national movements."

In reaching its evaluation that multi-employer bargaining is not appropriate with respect to the crew-consist proposals involved here, the court below stated (App. B, at 25a) "that although the BRT and the carriers have occasionally discussed crew consist problems on a national scale, there has never been a national crew consist rule." When one looks at the facts brought out at the trial, however, a considerably different picture is presented. Those facts disclose that the consistent past practice of engaging in national handling, whenever substantially identical proposals are served at about the same time by or upon a multiple number of carriers, has included national handling of crew-consist proposals on several occasions. The disputes created by such proposals, when served in 1941, 1944, 1945, 1947 and 1956, were successfully disposed of by voluntary agreements in national handling. To be sure, they were settled by agreement to withdraw the proposals, but national handling did succeed in settling the matter

peacefully—something that the conferences on the local properties failed to do then and in the current dispute. See p. 9, *supra*. Furthermore, crew consist proposals were again handled nationally in connection with the 1959-1960 Section 6 notices which eventuated in Award 282—the equivalent of a national agreement establishing national procedures and guidelines for determining crew consists. See pp. 4-7, 23, *supra*.

The court below appears to have primarily relied, however, upon the fact that the Presidential Railroad Commission and the Neutral Members of Board 282 deemed a "national prescription of crew size" to be "wholly unrealistic" (App. B, at 25a). But the court below was, if anything, even more mistaken in its evaluation of that fact. The comment thus relied upon was directed by the Neutral Members to the uniform national crew consist rule proposed by respondent—the proposal for a conductor and two brakemen or helpers on all crews which respondent again made in its 1965 Section 6 notices—in the course of demonstrating the unsatisfactory nature of that proposal. Neither the Commission nor the Neutral Members of Board 282 either stated or implied that a national crew-consist *agreement* is "wholly unrealistic." Rather, the Commission recommended such an agreement and Board 282 provided the equivalent of one in its Award. While the Commission and Board rejected the carriers' original proposal—to grant management discretion to determine crew sizes—for other reasons, they did not deem such a national rule to be "unrealistic" or impractical, and they recognized that the proposed rule would permit any adjustments in crew size that the circumstances attending the operation of the crew might necessitate. See pp. 5-6, *supra*. This Court should not ignore the fact, as the court below seems to have done, that the carriers' demand for multi-employer bargaining related to their proposal as

well as to respondent's proposal—both of which were part of the same negotiations. Moreover, the carriers offered to modify their proposal so as to adopt the same approach to a national agreement as was recommended by the Presidential Railroad Commission and as was approved by Board 282—the establishment of national procedures and guidelines for making changes in crew consist.

The reliance by the court below upon the condemnation by "objective boards officially deputized to study the underlying problems and formulate appropriate dispositions" (App. B, at 25a) of the very crew-consist rule which respondent is now seeking to impose on all the carriers through whipsaw tactics, and that court's disregard of the fact that the carriers are seeking to reach through national handling the "appropriate dispositions" which those objective boards in fact recommended or approved, demonstrates conclusively, we believe, that the decision below also is "wholly unrealistic."

Conclusion

For the reasons stated above, certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

Opinion

This is the trial of an action brought by three railroad companies,—Atlantic Coast Line Railroad Company, Boston and Maine Corporation, and Des Moines Union Railway Company—, against the Brotherhood of Railroad Trainmen, a union composed of railroad employees, for an injunction restraining the defendant from calling a strike because of a dispute over the size and composition of train and yard crews.

The gravamen of the action is the contention that the defendant has not exhausted its remedies under the Railway Labor Act, and that a strike prior to completed recourse to them is illegal. The Union seeks the adoption of a uniform rule on all railroads providing that every train and yard crew shall consist of a minimum of three persons: a conductor and two brakemen in the case of trains, and a foreman and two helpers in the case of yards. On the other hand, the railroads maintain that in many instances a smaller crew is sufficient to do the necessary work without endangering safety. In the parlance of the railroad industry, the composition of crews is colloquially known as "crew consist."

At the commencement of this action a ten-day temporary restraining order was issued by this Court on the plaintiffs' application. Simultaneously plaintiffs' counsel moved for a preliminary injunction. On the return day of this motion, the Court, with the consent of counsel for both sides, ordered that the trial of the action on the merits be advanced and consolidated with the hearing on the application for a preliminary injunction, as authorized by the recent amendment to Rule 65(a)(2) of the Federal Rules of Civil Procedure. In a commendable manner, counsel for the defendant announced that he was authorized by his client to make a commitment that it would not call a strike until after the entry of judgment of this Court following the trial of the action. Under the circumstances, both sides deemed a continuation of the temporary restraining order or the granting of a preliminary injunction superfluous.

Subsequent proceedings, including the trial, were conducted on the same high plane by all parties and their counsel.

As the controversy presented to the Court is founded on the construction and application of the Railway Labor Act, it is desirable at the outset to analyze and summarize the statutory scheme. The Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended by the Act of June 21, 1934, 48 Stat. 1186; 45 U.S.C. §§ 151-163) established a system for the amicable adjustment of labor disputes in the railroad industry. It contains a well-conceived, carefully planned, elaborate system for the settlement of differences between carriers and their employees by means of negotiation, mediation, and arbitration. It provides in detail certain specified steps to be successively pursued in chronological order when such a controversy arises. Neither employers nor employees may unilaterally make or insist on any changes in agreements affecting rates of pay, rules, or working conditions, without first resorting to the remedies provided by the Act. Chief Justice Hughes stated that the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes, *Texas & N.O.R.Co.* v. *Ry. Clerks,* 281 U. S. 548, 565.

It is emphatically announced in the statute that "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Sec. 2, 45 U.S.C. §152, par. "First." The provision immediately following prescribes that, "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conferences between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

It is expressly provided that no carrier shall change the rates of pay, rules, or working conditions of its employees as a class, as embodied in agreements, except in the manner

prescribed in the agreements, or in Section 6 of the Act, 45 U.S.C. § 156. It is then directed that the initial step to be taken either by a carrier or by an organization of employees in the event that either desires an alteration in existing arrangements, is to serve a thirty days' written notice of intention to achieve the change, Sec. 6, 45 U.S.C. § 156. Such notices have come to be known in the industry as "Section 6 notices". A time and place for the beginning of conferences between the representatives of the parties, are then to be agreed upon within ten days after the receipt of the notice. The date of the first conference must be within the thirty-day period named in the notice.

If conferences do not result in a settlement of the dispute, the next step is mediation. For that purpose the President of the United States was authorized to create a permanent agency, known as "The National Mediation Board", Sec. 4, 45 U.S.C. § 154. Any party to a dispute is authorized to invoke its services. In addition the Board may proffer its aid on its own initiative. The duty of the Board is to use its best efforts to bring the parties to an agreement by mediation. If its attempts are unsuccessful, the Board is directed to endeavor to induce the parties to submit their controversy to arbitration. If arbitration is refused the Board must at once notify both parties in writing that its efforts at mediation have failed. For thirty days thereafter no change may be made in the rates of pay, rules, or working conditions, or established practices, Sec. 5, 45 U.S.C. § 155. At the end of this thirty-day period, the remedies under the Railway Labor Act are deemed exhausted, unless in the judgment of the Board the dispute threatens to interrupt interstate commerce substantially, and the Board so notifies the President. He may thereupon appoint an Emergency Board to investigate and report concerning the dispute. After the creation of the Emergency Board and for thirty days after it has submitted its report to the President, no change, except by agreement, may be made by the parties in the conditions out of which the dispute arose. Sec. 10, 45 U.S.C. § 160.

At the expiration of the thirty-day period following the termination of mediation or the submission of the report of the Emergency Board, as the case may be, if the dispute

still remains unresolved, either party may act unilaterally and resort to self-help. Specifically, the carrier may proceed to make desired changes in rates of pay, rules, or working conditions and discharge employees whom it deems unnecessary. On the other hand, the employees organization may call a strike, *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284. Conversely, neither party may resort to self-help until all of the remedies provided by the Railway Labor Act have been exhausted, and the thirty-day period has elapsed.[1]

The present controversy had its inception on November 2, 1959. At that time carriers comprising almost all Class I railroads in the United States, approximately 200 in number, served notices under Section 6 of the Railway Labor Act, proposing uniform changes in various work and compensation rules. The proposal had two principal aspects. The first was an elimination of firemen on Diesel engines in freight and yard service. The second was an abrogation of all regulations concerning size and composition of train and yard crews. On September 7, 1960, counter notices were served by the various employees' organizations, including the defendant Brotherhood. The Unions by a subsequent clarification proposed the adoption of a uniform rule requiring not less than one conductor and two brakemen, or one foreman and two helpers on all train and yard crews.

Resort was had successively to the various remedies accorded by the Railway Labor Act, including an Emergency Board specially appointed by the President. All efforts at an amicable settlement, however, proved unavailing. A nationwide strike was imminent, which would have created a national disaster. Congress promptly passed a Joint Resolution, which was approved by the President on August 28, 1963, Public Law 88-108, 77 Stat. 132.[2] It directed a

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[1] This Court had occasion to review and summarize the provisions of the Act in *Akron & Barberton R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691, 692.

[2] The events leading to the enactment of the Joint Resolution are narrated in greater detail in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, 14-15.

compulsory binding arbitration of the dispute by a special arbitration board, to consist in part of members to be designated by each of the contending groups, and in part of members to be selected by the President. Strikes and lockouts over the dispute were forbidden during the effective term of the statute. The Joint Resolution was to expire 180 days after the date of its enactment, except that it was to remain in effect for the period of the Award with respect to any award that might be made by the Arbitration Board. The time during which the award should continue in force was to be fixed by the Board, but was not to exceed two years from the date when it took effect.

In due course the special board, known as Arbitration Board 282, filed its Award, which became effective on January 25, 1964. It prescribed that the Award should remain in effect for two years, i.e., until January 25, 1966. This decision disposed of the issue relating to the employment of firemen on Diesel engines in freight and yard service. That aspect of the matter is not involved in the present litigation and, therefore, will not be discussed in this opinion. The Award also determined the "crew consist" issue in the following manner. A series of standards or criteria denominated as "guidelines", were formulated. They were to be followed in determining the size and composition of individual train and yard crews. No changes were to be made in any rule or practice requiring a stipulated number of trainmen, brakemen, or helpers, except by agreement. Any party, however, was permitted to give written notice of any desired alteration. If the matter was not then adjusted in conference and no agreement was reached, the subject was to be referred to a special board of adjustment, whose decision was to be binding. It was provided, however, that all trainmen, brakemen and helpers, other than those on furlough when Award 282 became effective, were to retain their employment until they retired, were discharged for cause, resigned or died. These men became known as "protected employees". In other words, any reduction of the size of crews authorized by the special boards of adjustment would not become effective except by attrition in the ranks of employees. In an action brought

by organizations of employees to impeach the Award, the decision of Board was confirmed. *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, aff'd. 118 U.S. App. D.C. 100, 331 F. 2d 1020, cert. den. 377 U.S. 918.

Numerous special boards were eventually created on various railroad lines pursuant to Award 282, and a great many decisions changing the size of specific crews were rendered. Some of these local boards were still in operation at the termination of the effective period of the award, namely, January 25, 1966. This Court held that the local boards had no power to act subsequently to that date, *Akron & Barberton Belt R. Co.* v. *Brotherhood of Railroad Trainmen*, 252 F. Supp. 207, 210-211.

The original controversy that arose in 1959 was resumed by the service of notices by the defendant Brotherhood on about eighty railroads between June 18 and July 7, 1965. The notices uniformly proposed minimum crews of one conductor or foreman and two trainmen or helpers, precisely as had been done in the notices served in 1960. The carriers responded on December 24, 1965 by serving notices parallel to those they had served in 1959, proposing a rule leaving the size of crews entirely within the discretion of the management. Attempted conferences proved abortive, because the carriers took the position that the notices were premature while Award 282 was in effect and, therefore, could not be served prior to January 25, 1966. This position was upheld by this Court especially in view of the fact that local boards created under Award 282 were then operating on many railroads and were dealing with the same question. Nevertheless this Court also ruled that the notices actually served need not be served again after January 25, 1966, but would be deemed effective as of that date. *Akron & Barberton Belt R. Co.* v. *Brotherhood of Railroad Trainmen*, 250 F. Supp. 691, 697.

After this decision of this Court culminated in a final judgment on May 12, 1966, conferences were resumed in accordance with the decree. Separate meetings were held at different times and places in respect to individual railroads. The earliest were in connection with the three plain-

tiffs in this action—Atlantic Coast Line, Boston and Maine, and Des Moines Union Railway. In each instance the employer and employees were represented by their local officials. In each instance, the employer's representative requested that the issue be negotiated on a national basis by national representatives of the two groups, instead of separately on each "property", using the jargon of the railroad industry. The basis for this request was the fact that uniform notices, each containing identical proposals, were served practically simultaneously on numerous carriers. In each instance representatives of the Brotherhood declined to accede to "national handling" of the question and insisted that the matter be considered separately as to each road that had received or served notices. The separate conferences did not result in any agreement or adjustment of the dispute.

In each instance after being notified of the outcome by its local representative, the President of the Union, Charles Luna, requested the services of the National Mediation Board. The Board granted the applications. Accordingly separate mediation sessions were held in respect to each of the three roads under the guidance of a mediator designated by the Board. These proceedings likewise proved unavailing. The Mediation Board, in accordance with the requirements of the Act, in each instance then proffered arbitration. The railroads consented, but the Brotherhood declined to submit the matter to arbitration. The Board then formally notified the contending parties, again in accordance with the statutory provisions, that it was terminating its services. This action started the thirty-day period, at the end of which the parties would be free to resort to self-help. In other words the Union would be at liberty to call a strike. While this result could have been prevented, for the time being at least, if the Mediation Board, again in accordance with the statute, certified the matter to the President for the creation of an Emergency Board, the Mediation Board failed to act on the suggestion of the carriers that this be done. The present law suit was then instituted by the three railroads.

It is understood to be the defendant's position that it is

free to call a strike if it chooses to do so on any one of the three roads involved in this action. On the other hand, it is claimed by the plaintiffs that there has been no compliance with the prerequisites prescribed by the Railway Labor Act, in that the negotiations did not comply with its terms and, therefore, they should be resumed and conducted on a proper basis. This contention, in turn, is predicated on two grounds. First, it is urged that the attitude of the representatives of the Union at the conferences was so adamant and intransigent as to preclude a real, sincere discussion and genuine negotiation. Second, it is argued that the railroads were entitled to conduct negotiations as a multi-employer unit on a national basis instead of separately with each road, in view of the fact that the notices were served by the Brotherhood practically simultaneously and made in effect identical demands. We shall discuss separately each of these two aspects of the subject.

Taking up the first of these two contentions, it is necessary to define the statutory duty to negotiate. It is an obligation to negotiate genuinely and sincerely with the aim of amicably settling the differences between the parties and concluding an agreement. It is not sufficient to appear at a conference or a meeting with the other party and to submit an offer, or to make a demand, and yet to decline to argue its merits, or to refuse to entertain or discuss a counter-proposal. It is not a genuine negotiation to indicate that the other party has no choice except to accept the offer or accede to the demand. The service of an ultimatum does not constitute a negotiation.

On the other hand, a party is not required to agree or to make concessions. It has a right to maintain a resolute and firm attitude. It was said recently by the Court of Appeals for this Circuit that, "It is elementary that firmness of a bargaining position does not constitute bad faith", *Dallas General Drivers, etc.* v. *N.L.R.B.*, 122 U.S. App. D.C. 417, 419, 355 F. 2d 842, 844. All that is required is to enter into a sincere genuine discussion, to consider the objections and suggestions advanced by the other party, to discuss the relative merits of its own proposals and those of any counter-offer, and finally, if convinced, to make such concessions as may seem appropriate.

In the leading case decided under the Railway Labor Act, *Virginian Ry.* v. *Federation*, 300 U.S. 515, 548, Justice Stone defined this duty as follows:

> "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First."

This case holds that a fulfillment of this obligation may be compelled by judicial decree.

In *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395, 402, Chief Justice Vinson stated that a mere willingness to enter upon a sterile discussion does not constitute a fulfillment of the duty to bargain. The parties must be willing to negotiate in good faith, to match their proposals, if unacceptable, with counter-proposals, and to make every reasonable effort to reach an agreement.

Taking up each of the three plaintiff railroads separately, conferences of officials of the Atlantic Coast Line and of the Union were held on June 29 and 30, 1966, and again on four days in July. At the outset the carrier's representatives in the light of prior precedents requested that the subject be handled on a national basis, since numerous railroads were concerned. This request was flatly denied by the representatives of the Union. Both the carrier and the Union made some concessions, which did not appear to be sufficient to the other party. They were unable to arrive at a middle ground, and on July 27, the conferences were terminated. The President of the Union, Charles Luna, then requested the services of the National Mediation Board. A series of mediation conferences were held with a member of the Board, but likewise proved unavailing. The Board then formally terminated its services. During the conferences there were full discussions of the various aspects of the differences between the parties. The Court

finds that the negotiations were genuine, and concludes that they complied with the Railway Labor Act.

As to the Boston and Maine, meetings of the representatives of the carrier and the Union were held on July 12 and 13, 1966. The former requested national handling which was refused by the Union. There was considerable discussion. The representative of the Union receded from his extreme position and agreed not to insist on a crew of three on so-called single Budd cars used in passenger commuter service. The conference adjourned with the understanding that the carrier's representative would submit a counter-proposal. Before this was done, however, the President of the Union applied for the services of the National Mediation Board, and several sessions were held with the mediator in September. The carrier presented a proposal consisting of a number of items. The representatives of the Union accepted some and rejected others. No agreement was reached, and in this case the Board formally terminated its services. The Court finds that the negotiations were genuine and concludes that they complied with the requirements of the statute.

The situation in respect to the Des Moines Union Railway was somewhat different. This carrier is a little road a few miles in length, located entirely within the city of Des Moines, Iowa, and rendering solely freight service. It operates with a small number of crews. Consequently the range of discussion necessarily was narrow. Conferences were held on June 30, and again on August 11. National handling was requested by the carrier, but refused by the Union. The representative of the Union argued that a crew of one conductor or foreman and two brakemen or helpers would be more economical and productive, even from the standpoint of the railroad, than a crew of two men, which was the desire of the carrier. There was a thorough discussion. Neither side receded from its position and there was no agreement. In the light of the circumstances, the Court is unable to find that a genuine negotiation was lacking and, therefore, concludes that there was compliance with the pertinent provisions of the Railway Labor Act.

It was argued by counsel for the carriers, however, that in order that a negotiation may be deemed genuine as complying with the statutory requirements, a party's proposals must be reasonable. He contended that it must be within a debatable range and not so extreme as necessarily to preclude favorable consideration. He urged that the proposal of the Union would have actually wiped out everything that had been accomplished under Award 282, and would have brought conditions back to August 1963, when Congress ordered a compulsory arbitration. Counsel argued that the carrier could not be expected to give a sympathetic hearing to such an extreme demand.

The Court is unable to accept this view. In negotiations generally, parties at times, as a matter of tactics, start from an immoderate position. Genuineness of negotiations does not necessarily depend upon the nature or reasonableness of the initial proposal. In fact, in this instance the carriers' original proposal was equally untenable. Moreover, the reasonableness of a proposal contained in a Section 6 notice, should not be subject to judicial review. Cases relating to the question whether specific topics are within the realm of collective bargaining are distinguishable in principle.

A much more complicated problem arises in connection with the carriers' contention that they were entitled to negotiate on a national basis, as a multi-employer unit, and that each individual carrier could not be required to negotiate with the Union separately. A brief summary of the two national organizations is necessary in this connection. All Class I railroads in this country as a group have established a central organization, known as the National Railway Labor Conference, having its headquarters in Chicago. James E. Wolfe is the President of the Conference and is aided by an Assistant and a number of vice presidents. The Conference represents railroads in labor matters and specifically in negotiations with various Unions of railroad employees. From time to time, individual carriers give a power of attorney to the Conference to represent them. While negotiations on individual railroads may be conducted by company officials, a vice president of the Conference generally participates, if and when the proceedings reach the mediation stage.

The defendant Brotherhood of Railroad Trainmen, as its name indicates, is composed of trainmen employed by various railroads. It is likewise a national organization, with its headquarters in Cleveland. Its President is Charles Luna, who is aided by an assistant and vice presidents assigned to various regions. An official of the Union, known as a General Chairman, is attached to every railroad or group of railroads. In turn, he is assisted by local committees. Conferences involving a single railroad are ordinarily conducted either by a local committee, or by the General Chairman assigned to the carrier. If and when the matter reaches the mediation stage, a vice president of the Union is designated by the President to assist the General Chairman and in effect to take charge of the proceedings.

For many years it has been the practice in the railroad industry to handle on a national basis the adjustment of labor disputes that affect more than a single carrier. The railroads became a multi-employer bargaining unit. The National Railway Labor Conference acts as its representative. Among the numerous topics that have been treated in this manner are wage disputes, health and welfare matters, Union shop, vacations, supplemental annuities, conditions of employment and other similar subjects. Only within the past few months the defendant Union, through its President, Charles Luna, negotiated a wage agreement with numerous railroads on a national basis, James E. Wolfe acting as their representative. The result was a substantial raise in trainmen's wages.

Whenever a series of identical notices is served on a number of carriers, at about the same time, the subject matter is peculiarly fitting for what is called in the industry "national handling" and becomes a "national issue". The National Mediation Board has on a number of occasions urged negotiations and adjustments on a national basis in such cases. It has discouraged attempts to negotiate such matters individually with each railroad concerned.

The present controversy is a continuation of the dispute commenced by the service of notices in 1959 and 1960. It was conducted on a nation-wide basis, until the new notices were served in 1965. Then the Union retreated from any

attempt to resume and continue negotiations on a national scale. It began to insist on treating with each railroad, separately. This new phase appears to be an unusual instance in which national handling has been resisted in a case of notices making the same demand on a number of carriers served at about the same time.

Actually the current stage of the dispute has been handled nationally on both sides, except that the Union declined to face the carriers as a group. In June 1965 Mr. Luna, the President of the Union, sent a circular letter to all local General Chairmen of his organization instructing them to serve Section 6 notices prior to July 7, 1965, making a uniform demand for the adoption of a requirement that every train and yard crew consist of a minimum of three persons, one conductor or foreman and two brakemen or helpers. A draft of the proposed notice was attached to the circular letter for use by the General Chairman. About eighty notices on as many railroads, identical in form, were served within three weeks after Mr. Luna's letter was sent out.

When the carriers started to receive these notices, Mr. Wolfe, in turn, sent a circular letter to the railroads proposing a uniform reply and enclosing a draft. He also caused about 100 carriers to send uniform notices to the Union, making identical counter-proposals. The General Chairmen of the Union transmitted to Mr. Luna the replies that came from the carriers, and were instructed by him how to proceed further. In each instance he warned them to decline any request for national handling of the dispute. The degree of control at the national headquarters of the Union is illustrated by the fact that one General Chairman suggested that it might be well to accept what he called a "short crew", and demand additional compensation instead. Mr. Luna promptly replied politely but firmly, that this course would be contrary to Union policy, because the Union wanted to insist on the larger size crew. The suggestion was immediately dropped by the General Chairman who originated it.

The evidence shows that Mr. Luna's purpose in avoiding negotiations on a national basis in this instance and preferring to deal with each railroad separately, was to escape

from being eventually relegated to a position where he would have a choice of calling either a nationwide strike, or no strike at all. He realistically realized as a result of his experience in 1963 that Congress would not tolerate such a national emergency, but thought that Congress might not interfere with separate strikes on individual railroads at different times. His plan was to isolate every railroad and call separate strikes, one at a time, in order to achieve his ultimate objective, step by step.

Mr. Luna agreed that many subjects were susceptible of national handling. In fact, as has been indicated, within the past few months he, himself, negotiated a wage agreement with the railroads on a national basis. At the trial it was argued by the Union, however, that the size of crews is peculiarly a local matter, because it depends in large part on conditions prevailing on various railroads in different parts of the country. At first blush this argument seems plausible on its surface. It is contradicted, however, by the very actions of the Union. The fact that the Union served identical notices on about eighty railroads within a period of less than three weeks, proposing a general rule regulating the size and composition of crews, clearly demonstrates that the Union regarded this subject as appropriate for uniform regulation and, therefore, suitable for negotiations on a national basis.

It is clear that each of the two rival commanders-in-chief, Mr. Wolfe for the carriers and Mr. Luna for the Union, in a far-sighted manner planned a series of strategic moves. Each organized a united front. One desired to use his forces to face his adversary as a unit. The other planned to pursue the policy of divide and conquer. He did not want to confront his opponent's united front. At this point the law and the public interest step in.

The evidence establishes the fact that as a matter of custom and practice the railroads have for many years acted jointly in labor disputes as a multi-employer unit represented by the National Railway Labor Conference whenever the controversy involved a number of carriers. The Railway Labor Act by its express provisions authorizes carriers to act jointly as a group in negotiating matters initiated by notices under Section 6. Thus, it is provided in Section 1,

which contains definitions, paragraph Sixth, 45 U.S.C. § 151, as follows:

> "Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or *group of carriers* or by its or their employees, to act for it or them." (Emphasis ours.)

The conclusion follows that a group of carriers may designate a single representative. It seems significant that the original 1926 Act, 44 Stat. 577, did not include any definition of the word "representative", but that this paragraph was inserted by an amendment in the 1934 Act, 48 Stat. 1185, which revamped the original statute. Section 2 of the Act, 45 U.S.C. § 152 contains the following provision:

> "Second. All disputes between a carrier *or carriers* and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier *or carriers* and by the employees thereof interested in the dispute." (Emphasis ours.)

The Act should, therefore, be construed as authorizing and empowering carriers to bargain and negotiate as a group in any labor dispute cognizable under the Railway Labor Act. This consideration is alone sufficient to sustain the position of the carriers, that in failing to meet and confer with them through a representative of the entire group the Union has failed to comply with the first requirement of the Railway Labor Act, namely, to confer and conduct a genuine negotiation.

The existence of multi-employer bargaining units and their right to insist on negotiating as a group, has been recognized and sanctioned by judicial decisions. In *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, eight employers in the linen supply business in and around Buffalo, New York, comprised the membership of the Linen and Credit Exchange. For approximately 13 years the Exchange had bargained with the Truck Drivers on a multi-

employer basis and negotiated collective bargaining agreements signed both by the eight employers and by the Union. In the course of negotiations for a new contract, the Union called a strike at the plant of one of the employers. The remaining seven members laid off their employees, advising the Union that these drivers would be reinstated if the Union ended the strike. Shortly thereafter a new agreement was reached, the strike was terminated, and all the drivers were recalled to duty. The Union filed charges with the National Labor Relations Board that the lock-out had constituted an unfair labor practice. The Supreme Court sustained the integrity of the multi-employer bargaining unit and the right of the employers to insist on negotiating on a group basis. It was held that as a defensive and retaliatory measure the employers who were not affected by the strike had a right to have recourse to a temporary lock-out. Mr. Justice Brennan in the course of his opinion, made the following observation (p. 95):

> ". . . in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."

In a later decision, *National Labor Relations Board* v. *Brown*, 380 U.S. 278, the Supreme Court went even further. Five operators of retail food stores in Carlsbad, New Mexico, composed a multi-employer bargaining group and had negotiated and contracted successfully on a group basis with the Local Retail Clerks Union for many years. In the course of negotiations for a new agreement the Union called a strike against one of the employers. The remaining employers continued to carry on their business, but locked out all their employees who were represented by the Union, and in the meantime operated with other members of the staff and some temporary employees. The strike continued for over a month. When an agreement was reached, both the strikers and the employees who had been locked out were restored to their jobs. The Supreme Court sustained the right of the employers to negotiate as a group, and as a corollary upheld their privilege to use a lock-out as a de-

fensive measure in case of a strike against one member of the multiple unit. A strike of this nature has become known in the field of labor relations as a "whipsaw" strike.

The principle emerges from these two decisions that a group of employers has the right to insist on negotiating labor disputes as a multi-employer bargaining unit and its members may refuse to negotiate singly. While the Supreme Court sanctioned the use of a lock-out as a defensive weapon against a violation of this right, there is no intimation that this constitutes the exclusive remedy available to the employers. Manifestly, a lock-out cannot be invoked by a railroad or other public utility, for it must continue operating and must have competent employees for that purpose. Carriers may resort to other measures to vindicate their right to negotiate as a unit. The Supreme Court in *Virginian Ry.* v. *Federation,* 300 U.S. 515, held that the duty to negotiate in accordance with the requirements of the Railway Labor Act may be enforced by judicial decree. The conclusion is inescapable that the right of employers to negotiate as a group may be compelled in that manner.

Various Courts of Appeals have had occasion to apply these principles. They have enforced this duty reciprocally against individual employers. Thus, in *National Labor Relations Board* v. *Sheridan Creations, Inc.* (2d Cir.) 357 F. 2d 245, an employers' association was organized to negotiate in behalf of its members as a unit in labor disputes of general interest, leaving to the individual employers the task of negotiating on matters affecting them separately. A member of the employers' association sought to withdraw after negotiations for a new contract were started, and refused to be bound by the agreement negotiated by his organization. The Court held that an employer was not entitled to withdraw after the negotiations started and was obligated by the contract concluded in behalf of the group.

In *Universal Insulation Corp.* v. *N.L.R.B.* (6th Cir.) 361 F. 2d 406, it was likewise held that an employer member of a collective bargaining association was bound by the contract made by the organization and was not entitled to withdraw after negotiations for a new agreement had started.

Publishers' Association of New York City v. *N.L.R.B.* (2d Cir.) 364 F. 2d 293, is cited as an authority to the contrary. In that case the Union had timely withdrawn from multi-employer bargaining unit negotiations. The National Labor Relations Board sustained the action of the Union, and its decision was affirmed by the Court of Appeals. The Court intimated, however, that the employers had the weapon of a lock-out for their protection. Such a weapon does not in fact exist in connection with the railroads and other public utilities, and, therefore, this decision is neither controlling or persuasive.

While it is true that the decisions that have been just discussed were rendered under the National Labor Relations Act, instead of under the Railway Labor Act, the difference is one in fact, and there is no distinction in principle, since the obligation to negotiate in a genuine manner exists under both statutes. This question has not been litigated to any extent under the Railway Labor Act, because it has not arisen. There is, however, a decision where the question was discussed in connection with that statute, in which Judge Ryan of the Southern District of New York wrote the opinion, *Kennedy* v. *Long Island Railroad Co.*, 211 F. Supp. 478, 488, affirmed 319 F. 2d 366, cert. den. 375 U.S. 830. He made the following comments on this point:

> "Multicarrier bargaining of labor demands, referred to as regional and national handling, has been and is (since the Act) the customary method of collective bargaining."

In the light of the foregoing discussion, the Court finds that the carriers had an established multi-employer bargaining unit for negotiating labor disputes affecting more than one carrier. The Court concludes that the plaintiffs had a right to insist on negotiating in that manner and that negotiations not so conducted did not comply with the requirements of the Act. The right to negotiate as a multi-employer bargaining unit may be enforced and compelled by judicial decree. It follows hence that the defendant has not exhausted its remedies under the Railway Labor

Act and it would therefore be a violation of law for the defendant to call a strike on any of the plaintiff railroads in the present posture of the controversy.

Insofar as the Norris-LaGuardia Act is concerned, which counsel for the Union cite, it has been held on numerous occasions that where the Railway Labor Act conflicts with the Norris-LaGuardia Act, the former prevails. *Virginian Ry Co.* v. *Federation*, 300 U.S. 515, 562-3; *Brotherhood of Railway Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30; *Brotherhood of Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33; *Manning* v. *American Airlines Inc.* (2d Cir.) 329 F. 2d 32, 34; *Akron & Barberton Belt R. Co.* v. *Brotherhood of Railway Trainmen*, 250 F. Supp. 691. The Norris-LaGuardia Act does not apply if the remedies under the Railway Labor Act have not been exhausted.

Accordingly the Court will render judgment directing the defendant to negotiate with the plaintiffs on a multi-employer unit basis and enjoining the calling of a strike on any of the plaintiff railroads until and unless such negotiations are properly held and concluded and all the other remedies provided by the Railway Labor Act are also exhausted.

This opinion will constitute findings of fact and conclusions of law. Counsel may submit a proposed judgment.

ALEXANDER HOLTZOFF,
United States District Judge.

January 16, 1967.

APPENDIX B

Before BASTIAN, *Senior Circuit Judge,* TAMM AND LEVENTHAL, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This appeal involves still another phase of the railroad work rules dispute that erupted again in 1959 when the nation's major carriers served notices under Section 6 of the Railway Labor Act, 45 U.S.C. § 156 (1964), to abrogate existing rules regulating the use of conductors and trainmen, or "crew consist," on yard and road crews. We have recently recounted the events that followed this opening round.[1] It suffices here to say that in 1960 the Brotherhood of Railroad Trainmen (BRT) served counter notices insisting that not less than one conductor and two trainmen be employed on all road and yard crews; negotiations and mediation proved unsuccessful, and only Congressional intervention and provision for compulsory arbitration forestalled a strike in 1963.

The arbitration award of Board 282 apparently failed to achieve one of its purposes, of guiding the way to a general, long range settlement.

In June and July of 1965 the BRT, anticipating the expiration of the arbitration award in January 1966, served identical notices on some eighty carriers embodying the same proposal they had made in 1960. The carriers responded that these notices were premature in insisting on bargaining during the pendency of the arbitration award, but in December 1965, without waiving their prematurity objection, those eighty carriers plus some twenty others served notices on the BRT proposing the same management-discretion rule they suggested in 1959. No genuine conferences had been held on either group of notices when the carriers obtained injunctions prohibiting a strike over their failure to bargain on the union's allegedly premature notices. We recently reversed the grant of this relief in

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[1] *See* Brotherhood of Railroad Trainmen v. Akron & B. Belt R.R., — U.S. App. D.C. —, — F.2d — (Nos. 21052 et al. May 12, 1967, Supplemental Opinion July 31, 1967.)

a decision (see note 1), holding that the union's notices were not in law premature.

In the meantime, conferences were taking place on the local properties, and some agreements were reached. The carriers had requested that the BRT acquiesce in their suggestion that if local negotiations bore no fruit, the dispute be referred to "national handling." From the outset the BRT refused to concur in this request. When local conferences broke down on various roads, the services of the National Mediation Board were invoked. The Board ignored a request by the carriers that mass mediation be scheduled, and instead docketed each dispute separately.

In November 1966, appellees, the Atlantic Coast Line Railroad, the Boston & Maine Corporation, and the Des Moines Union Railway, sued in the District Court for declaratory and injunctive relief against a possible strike on the grounds that the BRT first, had not participated in good faith negotiations at the local level, and, second, had breached a statutory obligation by refusing the request for national handling. The District Court after a trial rejected the first contention, but granted the relief sought on a finding that the Railway Labor Act authorized the carriers to demand national handling. In the context of this dispute we disagree, and accordingly we reverse.

I

Defense of Res Judicata

Before proceeding to the merits, we encounter the BRT's timely assertion that the carriers' prayer for relief was barred by the principle of *res judicata*, and in particular its manifestation in the doctrine of merger. The essence of this contention is that after the carriers procured their original injunction in January 1966, based on the supposed prematurity of the notices and the absence of any responsibility of the carriers to bargain prior to that time, the carriers filed a motion for supplemental relief in which they sought and obtained a ruling that genuine conferences still had not taken place. The BRT argues that the carriers could then have raised, and therefore were then obliged to raise, any objection to the refusal to go to national handling.

It is a well-settled and virtually axiomatic rule of sound judicial administration that a party having several alternative grounds for relief arising out of a particular transaction does not have the privilege of litigating his theories one at a time, holding one in reserve while he presses another to judgment. According to the complementary principles of bar and merger, whether a party loses or wins relief in his initial action, the judgment embodies all his rights stemming from the transaction involved, and he is foreclosed from later seeking relief on the basis of issues he might have raised in the prior proceeding to support the original claim.

The question in this case, however, is whether the carriers could have and should have raised the national handling problem in their April 1966 motion for supplemental relief. The transcript of the hearing on that motion reveals clearly that the District Court specifically inquired of counsel for the carriers whether he was urging as a violation of the BRT's duty under the Act its refusal to accept national handling. Counsel replied that he was "not urging that at this time." The BRT contends that this indicates that the dispute had materialized sufficiently to oblige the carriers to join this basis for their claim that bona fide conferences were not taking place.

In two recent cases we applied the principle of *res judicata* to cut off objections made by the BRT in litigations involving other carriers.[2] But we do not think it appropriate to invoke that principle against the claim of appellee carriers in this case. The carriers' motion for supplemental relief was based on the District Court's reservation of jurisdiction to construe and effectuate its judgment pronouncing the 1965 notices premature. The carriers sought a declaration that genuine conferences had not yet taken place. They did not have an obligation at that time to expand the relief they were seeking, even though the BRT was on record as opposing the demand for national handling, for this demand by the carriers was conditioned on the failure of local con-

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[2] *See* Brotherhood of Railroad Trainmen v. Chicago, M. St. P & Pac. R.R., — U.S. App. D.C. —, — F.2d — (Nos. 19867 et al. May 19, 1967); Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., — U.S. App. D.C. —, — F.2d — (Nos. 20212 et al. May 19, 1967).

ferences, and it was not yet clear that genuine, good faith local negotiations had been tried and exhausted. Added to the lack of ripeness at that time, there is a serious question about the propriety of introducing this issue in a motion for relief at the foot of the earlier decree, which was directed at very different questions. In this circumstance, we decline to dispose of the case on *res judicata* grounds.

II

National Handling and the Railway Labor Act

Coming to the merits, we conclude that the District Court erred in holding that the Railway Labor Act authorized the carriers to insist on national handling of this issue.

We reject the positions of both parties on the issue whether the Railway Labor Act permits a party to demand that national movements (the coordinated efforts to establish similar rules on a large number of railroads) be referred to national handling. One party says always, the other says never. Instead we find persuasive a more individuated approach, akin to that suggested in the brief of the United States appearing as *amicus curiae* urging reversal, which we shall set forth after analyzing the views of the parties.

The Carriers' Contention. The carriers say that national handling is the common technique for dealing with national movements in the railroad industry.

They assert that national handling can be demanded as of right when similar proposals are served at about the same time or upon a number of carriers. They lean on the language of Sections 1, Sixth, and 2, Second, of the Railway Labor Act,[3] and emphasize certain words, as will be indicated. Section 1, Sixth, defines "representative" as used in the Act to mean "any person or persons, labor union, organization, or corporation designated either by a carrier *or group of carriers* or by its or their employees, to act for it or them." Section 2, Second, declares that "disputes between a carrier *or carriers* and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and au-

[3] 45 U.S.C. §§ 151, Sixth, 152, Second (1964).

thorized so to confer, respectively, by the carrier or *carriers* and by the employees thereof interested in the dispute."

The carriers also argue that the dominant purpose of the legislative scheme, avoidance of interruptions in the flow of interstate commerce, would be promoted by recognizing a right to demand national handling, since historically national strikes have been infrequent, due to the pressure of public opinion and the threat of congressional intervention.

The BRT's Response. The BRT also invokes statutory language, pointing to Section 2, Ninth.[4] That section authorizes the National Mediation Board to designate the bargaining agent for railroad employees and, as the Board itself has construed it, refers only to certifications of single carrier units. From this BRT concludes that the single carrier unit is the only required bargaining unit.

BRT also turns to the history of national handling and argues that in the past all parties have always recognized the national approach to be a voluntary one, when carriers and union have shared the opinion that it would be more efficient and conducive to a settlement to bargain on a national scale. The union further contends that national handling of the crew consist issue, at least, ought not be found mandatory because past experience has demonstrated that it is unsuited to the prospect of successsful settlement. And, finally, the BRT insists that even if it be assumed that national handling might be required on this issue in some circumstances, there must be an opportunity for withdrawal from national handling, and that here the union clearly signified its desire to bargain only on the local properties far enough in advance that it may not be compelled to accede to such handling now.

The District Court Ruling. The District Judge interpreted Sections 1, Sixth and 1, Second of the Act as "alone sufficient to sustain the position of the carriers," holding the Act authorizes and empowers the carriers "to bargain and negotiate as a group in any labor dispute cognizable under the Railway Labor Act."

It reviewed the recent instances of national consideration of the crew consist issue, and held that the service of identi-

[4] 45 U.S.C. § 152, Ninth (1964).

cal proposals on some eighty carriers automatically demonstrates the continued appropriateness of national handling of this issue. This major premise of the District Court syllogism is not supportable in our view, and accordingly we reverse its conclusion that the present refusal to accept national handling constituted a bad faith abrogation of the BRT's statutory obligations.

It cannot be disputed that although the BRT and the carriers have occasionally discussed crew consist problems on a national scale, there has never been a national crew consist rule. That distinguishes the crew consist issue markedly, for example, from the national rule contained in the National Diesel Agreements governing the use of firemen. The thousands of existing crew consist agreements have been negotiated at the local level. This crucial distinction was emphasized by the Presidential Commission appointed to investigate the conditions on American Railroads. *See* REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION 54 (1962). That this has been the effective past practice, and promises the most encouraging likelihood for agreement, was reiterated by the Neutral Members of Board 282 who explained that it was in the light of this practical reality that they decided to remand the crew consist disputes to local negotiation, and if necessary to local arbitration. *See Opinion of the Neutral Members,* 41 LAB. ARB. 680, 682, 686-87, 693-98 (1964). These objective observers concluded forcefully: "A national prescription of crew size would be wholly unrealistic." 41 LAB. ARB. at 694. We would require a strong showing of continuous collective bargaining practice on a national scale before we find an obligation imposed by Congress to bargain on a basis deemed "wholly unrealistic" by objective boards officially deputized to study the underlying problems and formulate appropriate dispositions. The procedures of the Act are purposefully long and drawn out to afford the maximum inducement to peaceful settlement, but the Act does not require efforts clearly at war with reality.

What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained

in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue.

The conclusion that appellant breached its statutory obligation was not warranted, and the issuance of an injunction was improper.

Reversed.

APPENDIX C

Before: BASTIAN, Senior Circuit Judge, and TAMM and LEVENTHAL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed.

It is further ORDERED by the Court that appellant herein recover from appellees its taxable costs on this appeal, and have execution therefor.

Per Circuit Judge LEVENTHAL.

Dated: SEP 6—1967.

APPENDIX D

Statutes Involved

Section 3 of P.L. 88-108, 77 Stat. 132:

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.:

Section 1. When used in this Act and for the purposes of this Act—

• • • • •

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * *

GENERAL PURPOSES

SECTION 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without inter-

ference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such

information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

FUNCTIONS OF MEDIATION BOARD

SECTION 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * * *

EMERGENCY BOARD

SECTION 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such Board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses

and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

• • • • •

(3055-1)

SUPREME COURT, U. S.

JAN 2 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 683

ATLANTIC COAST LINE RAILROAD COMPANY,
BOSTON AND MAINE CORPORATION, and
DES MOINES UNION RAILWAY COMPANY,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 883

ATLANTIC COAST LINE RAILROAD COMPANY,
BOSTON AND MAINE CORPORATION, and
DES MOINES UNION RAILWAY COMPANY,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court (Appendix A to the petition) is reported at 262 F. Supp. 177. The opinion of the Court of Appeals (Appendix B to the petition) has not yet been officially reported. It is unofficially reported at 66 LRRM 2115.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the Respondent acted unlawfully in refusing to engage in national handling with Petitioners concerning the disputes raised by the Respondent's Section 6 crew-consist notices of June and July 1965 is res judicata that it did not act unlawfully.

2. Whether the Petitioners' failure to object to the assertion of jurisdiction by the National Mediation Board of the crew-consist disputes on the ground that the Respondent had failed to negotiate in good faith prior to mediation constituted a waiver of such objection by Petitioners.

3. Whether the Petitioners have the right to require Respondent to engage in national handling of the crew-consist disputes when prior handling of crew consist on a national basis has never resulted in agreement; when the most recent attempt at national handling of crew consist led to the brink of a nationwide railroad strike which was averted only by the intervention of the Congress; and when the National Mediation Board has refused the Petitioners' request to conduct mediation on a national level and has instead conducted separate mediation between the parties on the several railroads on which crew-consist disputes are pending.

4. Whether the Respondent, assuming a history of national handling of crew consist between the parties, is required to engage in national handling of the crew-consist disputes notwithstanding the Respondent's timely and unequivocal insistence that negotiations of the disputes be confined to the properties of the individual Petitioners on which the disputes arose.

STATEMENT OF THE CASE

This action is the third in a series of actions brought by the Petitioners to frustrate the efforts of the Respondent to resolve the separate disputes between the individual General Chairmen of the Respondent and approximately 100 railroads concerning the manning of train crews in road and yard service (commonly referred to as "crew consist" as opposed to crews employed in locomotives).

The first episode occurred in January 1966 when the railroads, including Petitioners, commenced a suit in the District of Columbia for declaratory judgment and injunctive relief involving the rights of the parties subject to the Award of Arbitration Board No. 282 established by the Congress pursuant to Public Law 88-108 (77 Stat. 132).[1] One of the issues presented to the Court in that case was the validity and effectiveness of notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) served by General Chairmen of the Respondent on approximately 80 railroads in June and July, 1965. The notices proposed changes in crew-consist rules to become effective January 26, 1966, after the expiration of the Arbitration Award. The railroads, including Petitioners, took the position that the notices were premature and refused the General Chairmen's requests that negotiations of the subject matter of the notices commence.

The District Court, on April 6, 1966, adjudged that the notices were premature and that the railroads were

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[1] The events leading to the enactment of Public Law 88-108 and the Award of Arbitration Board No. 282 are described in detail in *Bhd. of Locomotive Firemen and Enginemen, et al.* v. *Chicago, B. & Q. R.R., et al.*, 225 F. Supp. 11 (D.D.C., 1964).

not required to negotiate until the expiration of the Arbitration Award. The Respondent took an appeal from that determination.

While that appeal was pending, on April 12, 1966, the second episode began. Once again the railroads, including the Petitioners, filed suit in the District of Columbia requesting the Court to declare that the Respondent had not satisfied the "conference" requirements of the Railway Labor Act with respect to the Section 6 crew-consist notices of June and July 1965.

The motion recited that following the service of the Section 6 crew-consist notices by the General Chairmen of the Brotherhood the railroads advised the General Chairmen that the notices were premature and refused to negotiate.[2] The Brotherhood thereafter had invoked the mediatory services of the National Mediation Board and the Mediation Board had docketed the disputes over the objection of the railroads.

In each instance, following the service of a Section 6 crew-consist notice by a General Chairman, the representative of the particular railroad proposed that if a crew-consist agreement was not reached on the property, the dispute be submitted to national handling. In each instance, the General Chairman refused the proposal and insisted that negotiations be confined to the individual railroad.

On May 31, 1966, the District Court entered its order declaring that "full-fledged" conferences within the meaning of the Railway Labor Act had not occurred, and that mediation could not be undertaken until such

[2] These facts are shown by the Joint Appendix in Nos. 861 and 863, October Term, 1967.

conferences were concluded. The Court directed the parties to begin conferences. The Respondent took an appeal from that determination.

On May 12, 1967, the Court of Appeals issued one opinion deciding both appeals taken by the Respondent. The Court held that the Section 6 crew-consist notices of June and July 1965 were not premature and that the railroads had violated the Railway Labor Act by refusing to negotiate with the General Chairmen prior to the expiration of the Arbitration Award. The Court further held that in those cases in which, following the railroads' refusal to negotiate, the General Chairmen had invoked the mediatory services of the Mediation Board, the railroads had forfeited their right to insist on further negotiations, that mediation had properly been invoked, and should continue. *Bhd. of Railroad Trainmen, et al.* v. *The Akron & Barberton Belt R.R., et al.*, not yet officially reported, unofficially reported at 65 LRRM 2229.[3]

The latest episode involving the *same* Section 6 crew-consist notices of June and July 1965, to which this petition is addressed, was commenced by Petitioners on November 1, 1966. The complaint once again sought relief in the nature of a declaratory judgment and injunction. (JA 2-16) The evidence at the trial of the action established the following facts:

Subsequent to the District Court's order of May 31, 1966, in which the Court had held that conferences must be resumed, the General Chairmen of the Respondent received requests from the railroads and the Mediation Board that negotiations resume on the

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[3] The railroads have petitioned this Court to review that determination. (No. 863)

individual properties between the General Chairmen and the railroads on which crew-consist proposals were pending. (JA 279; 375)

Although the Respondent believed that the District Court's order was not correct and that further negotiations were not required (a belief vindicated by the Court of Appeals' May 12, 1967 decision, *supra*) it did agree to resume negotiations without waiving its legal position that such conferences were not required. Negotiations thereafter were held on the local properties of the railroads, including each of the Petitioners. (JA 433)

In each instance, during the course of the negotiations, each of the Petitioners proposed, as it previously had proposed, that if agreement was not reached on the property the dispute be referred to national handling. In each case, the General Chairman responded, as he previously had responded, that he would not agree to national handling of the crew-consist dispute. (JA 433)

On August 2, 1966, James E. Wolfe, chief spokesman for the railroads, sent a telegram to the National Mediation Board on behalf of the railroads involved in which he stated that the parties had now complied with the conference requirements of the Railway Labor Act. He further stated that mediation of all the crew-consist disputes should be handled on a national basis and he requested the Mediation Board to schedule mass mediation of the disputes. (JA 396-397) The Mediation Board refused to follow Wolfe's suggestion and separate mediation sessions were held with respect to each of the Petitioners. (JA 119-120)

The mediatory efforts of the Mediation Board on each of the Petitioners were unsuccessful and the

Mediation Board proffered arbitration to the parties. In each case, the General Chairman notified the President of the Brotherhood, Charles Luna, that arbitration was not desired, and Luna relayed the information to the Mediation Board. (JA 281; 434) On October 4, 1966, the Mediation Board advised the parties that it was that day terminating its services with respect to each of the disputes. (JA 13)

The Petitioners' complaint of November 1, 1966, the complaint in this case, raised two basic issues. First, the complaint alleged that the General Chairman on each of Petitioners had not engaged in good faith negotiations with the representatives of Petitioners on the local properties. Second, the complaint alleged that even if negotiations on the individual properties were in compliance with the requirements of the Railway Labor Act, the Respondent nevertheless failed to satisfy its bargaining duty under the Act by refusing to negotiate the crew-consist disputes on a national basis. (JA 13-14)

The District Court rendered its opinion on January 16, 1967. It found that the General Chairmen of the Respondent had negotiated in good faith with each of Petitioners and had satisfied the requirements of the Railway Labor Act in that respect. (JA 435-438) The Petitioners did not appeal that ruling. The Court further found, however, that the Respondent had violated the Railway Labor Act by refusing to engage in national handling of the crew-consist disputes with the Petitioners as well as other railroads on which crew-consist disputes were pending. The Respondent appealed the decision of the District Court that national handling of the crew-consist disputes was required under the Railway Labor Act.

The Department of Justice, on behalf of the United States, sought and received leave of the Court below to file a brief *amicus curiae* seeking reversal of the District Court's ruling that national handling of crew-consist was mandatory.[4]

The Court of Appeals reversed the holding of the District Court and ruled that the Petitioners could not require the Respondent to negotiate the issue of crew consist on a national level. The Court concluded (App. to petition, p. 26a):

> "What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical

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[4] The interest of the United States in seeking reversal was set forth in the following manner (Brief for the United States, pp. 2-3):

> "If its ruling stands, the district court has forced bargaining over the crew consist issue into a national mold—so that unless agreement is reached on that issue, the public may be confronted with another national railroad crisis. The Government believes that the Railway Labor Act does not require national handling on that heretofore local issue, without the consent of both parties to the dispute, and seeks to express that view in this brief, to protect the public interest in avoiding nationwide railroad strikes and threats of such strikes.
>
> "This brief is filed to present the views of the United States that the decision below is inimical both to the public interest and to the stated purpose of the Railway Labor Act of fostering the 'prompt and orderly settlement' of disputes in the railroad and airline industries."

> experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue."

Since the decision of the Court below is founded upon the "history and realities of crew consist bargaining" in the railroad industry, we believe it would be helpful to describe briefly the history of bargaining on the issue of crew consist.

Initially (and this fact is undisputed), there is not now, nor has there ever been, a national crew-consist rule. To the extent that there is in existence agreements covering the subject of crew consist, and there are thousands of such agreements, *all* resulted from agreement between a particular railroad and the representative of its employees.

James E. Wolfe, the spokesman for Petitioners, testified that the issue of crew consist had been the subject of negotiations on a national level in 1941, 1944-1945, 1947, 1956, and 1959-1960. In each instance, the issue of crew consist was only one of the issues involved. (JA 135-136) The results of such bargaining are revealing of the effectiveness of national handling as it relates to crew consist.

With respect to the negotiations in 1941, 1944-1945, 1947, and 1956, the parties agreed that no crew-consist agreement could be reached on a national basis and in each case the part of the proposal dealing with crew consist was withdrawn. (JA 136)

With respect to the proposals of 1959 and 1960, as they related to crew consist, not only did national

handling fail to resolve the crew-consist disputes,[5] but such bargaining almost resulted in a nationwide railroad strike which was averted only by Congressional action in enacting Public Law 88-108 which provided for compulsory arbitration to resolve the dispute temporarily.

THE WRIT SHOULD NOT BE GRANTED

The Petitioners' basic argument comes down to the proposition that where the same or similar disputes are pending between a railroad union and a substantial number of railroads, it is unlawful for the union to progress the resolution of the disputes in a manner that will not lead to a national crisis if agreement is not reached. But for the fact that they convinced a district judge that they were right, we would characterize such argument as frivolous. But such issue should not have been reached in this case because Petitioners are precluded from even making the argument.

I. The issue of whether the Respondent is required to engage in national handling of the crew-consist disputes raised by the Section 6 notices of June and July 1965 is res judicata that there is no such requirement.

The primary reason for this Court to deny the Petitioners' request to review the decision of the Court below is that the "Questions Presented" by the petition

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[5] One part of the dispute arising in connection with the 1959-1960 proposals concerned the manning of crews on self-propelled machines. (JA 129) This aspect of the dispute was not considered as relating to crew consist. See Report of the Presidential Railroad Commission, Chapter 6. (JA 297-298) The issue was not referred to arbitration by Public Law 88-108 and agreement on this issue was resolved on a national level along with other matters in what is commonly known as the "White House Agreement" of June 25, 1964.

need not be reached in affirming that decision. This is so because the issue of whether the Respondent violated the bargaining requirements of the Railway Labor Act in its negotiation of the crew-consist proposals of June and July 1965 already had been litigated in prior actions between the parties to this action, wherein it was held that *no* further negotiations over these notices is required. Thus, the issue is res judicata and it may not be litigated in this action.

In our Statement of the Case, we showed that this case is no less than the third separate attempt by Petitioners to delay and frustrate the progression of the same Section 6 crew-consist notices of June and July 1965 served severally by the General Chairmen of Respondent on approximately 80 railroads, including the Petitioners.

The first suit was brought by Petitioners in January 1966 and sought, *inter alia,* a declaration that the Section 6 crew-consist notices were premature and were ineffective to require negotiations. The General Chairman on each of the Petitioners took the position that the Petitioners' refusal to confer was unlawful, and following such refusals each General Chairman invoked the mediatory services of the National Mediation Board which accepted jurisdiction of the disputes over the railroads' protests.

The District Court agreed with the railroads' contention that the crew-consist notices were premature and directed that negotiations commence. The Court of Appeals, however, reversed the lower Court and held that further conferences were not required because of the railroads' unlawful refusal to bargain, and that the Respondent's invocation of mediation was

proper and mediation should continue.[6] The Court stated (65 LRRM at 2238):

> "We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after the termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. *The Carriers have foresaken their right to insist on conferences by their refusal to respect effective Section 6 notices.*" (Emphasis added.)

The Court thus held, in an action to which the Petitioners and Respondents were parties, that *no* further negotiation is required of the June and July 1965 Section 6 notices. The Petitioners' argument here, that Respondent must negotiate these same Section 6 notices on a national basis, is merely an attempt to relitigate the same issue and presents the text book example of a case in which the doctrine of res judicata is applicable. 1B *Moore's Federal Practice,* Second Ed., ¶ 0.401. See also *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591, 597 (1948).

In the present case, Petitioners insist that Respondent be required to engage in conferences on a national level of disputes concerning which the Court below,

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[6] *Bhd. of Railroad Trainmen, et al.* v. *The Akron & Barberton Belt R.R., et al.,* decided May 12, 1967, not yet officially reported, unofficially reported at 65 LRRM 2229 (D.C. Cir. 1967). Petition for certiorari pending, No. 863.

in the *Akron & Barberton Belt* case, held that Petitioners had "forsaken their right to insist on conferences."

It is true that the Court below declined to apply the doctrine of res judicata in this case. The Court's discussion of the res judicata issue, however, shows that it focused its examination solely on the question of whether this case was res judicata because the Petitioners failed to raise the issue of national handling in one of the prior proceedings. The Court overlooked completely the impact of the decision in the *Akron & Barberton Belt* case that *no* further negotiations, of any kind, were required on these Section 6 notices.

This Court should deny the petition for certiorari because the issue is res judicata.

II. The Petitioners' failure to object to the National Mediation Board's assumption of jurisdiction of the crew-consist disputes estops the Petitioners from contending now that negotiations prior to mediation did not satisfy the bargaining requirements of the Railway Labor Act.

This issue was raised in the Court below but was not passed upon.

The District Court's order of May 31, 1966 directed that (JA 33, ¶3):

> "Conferences within the meaning of Sections 5 and 6 of the Railway Labor Act, at which the parties engage in full-fledged negotiations on the merits of the notices, must be commenced within a reasonable time following the entry of this order."

Following the District Court's order, conferences were undertaken on each of the Petitioners. (JA 433) In no instance did any of Petitioners assert to the General Chairman of the Respondent that the General

Chairman was not negotiating in good faith because he would not agree to national handling of the crew-consist dispute. (JA 158; 282; 259)

Furthermore, in no instance did any of the Petitioners object to the National Mediation Board's assertion of jurisdiction to mediate the separate disputes. Indeed, the Petitioners requested the mediatory services of the Mediation Board in a telegram sent to the Mediation Board on August 2, 1966, in which they asserted that full-fledged conferences had taken place. The telegram stated (JA 396-397):

> "The orders of the United States District Court for the District of Columbia in regard to conferences subsequent to January 25, 1966, have now been carried out or the conferences are now in the process of termination."

It was not until almost thirty days had passed following the termination of the services of the National Mediation Board that the Petitioners filed their complaint alleging that the Respondent had refused to bargain in good faith *prior* to the invocation of the services of the Mediation Board. Having declared to the Mediation Board that the conferences had complied with the order of the District Court, and having requested the Mediation Board to assert jurisdiction to mediate the disputes, the Petitioners now should be estopped from asserting, in effect, that they had misinformed and tried to mislead the Mediation Board and that, in fact, conferences within the meaning of the Act had not taken place.

Accordingly, for this additional reason, the decision of the Court below plainly was correct and no further review is warranted.

III. The Court below was clearly right in holding that the Railway Labor Act does not require that disputes over the issue of crew consist be negotiated in national handling.

The Court below did not hold that national handling of disputes under the Railway Labor Act is unlawful. Nor did it hold that national handling can never be required under the Act. All it held was that the provisions of the Act could not reasonably be construed to require national handling of every dispute which happens to be pending on a number of railroads at the same time. The Court construed the Act as requiring (App. to petition, at 26a),

> "an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements."[7]

The Court applied its principle of an "issue-by-issue" approach to the issue of crew consist and determined that based upon the history of bargaining on the subject, the inescapable conclusion was that national handling was not a reasonable approach and could not be required.

The Petitioners contend that the Court below was in error both in its construction of the Act and in its application of its construction to the issue of crew consist.

The Petitioners argue that the Railway Labor Act *requires* national handling of disputes, over the objection of one of the parties, *every* time there are

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[7] It is in essence the same approach as that adopted by the National Labor Relations Board in determining the appropriateness of a multiemployer bargaining unit. *Chicago Metropolitan Home Builders Assn.*, 119 NLRB No. 141, 41 LRRM 1251 (1957).

similar proposals outstanding on a number of railroads. Under this argument, whether the subject matter of the dispute is appropriate for national handling, whether national handling has ever been attempted in the past, and if so, with what results, become irrelevant considerations. National handling can be required even if the parties are aware that national handling of the disputes in the past resulted in disaster and that continued bargaining on that basis will lead to more of the same. It is difficult to believe that it is seriously urged that the Railway Labor Act intends such result.

The purported statutory basis for the Petitioners' position is Section 1, Sixth of the Railway Labor Act (45 U.S.C. § 151, Sixth) and Section 2, Second of the Act (45 U.S.C. § 152, Second). Section 1, Sixth defines the term "representative" as used in the Railway Labor Act as including,

> "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

Section 2, Second provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The Petitioners cite the above provisions, emphasize the word "carriers" wherever it appears, and conclude that railroads have "an absolute right" to insist on

national handling of any dispute. It is interesting to note that the use of the word "employees" in the provisions apparently have no significance to the Petitioners. Petitioners have no difficulty in concluding that the provisions permit the "carriers" to dictate a method of bargaining while not permitting the "employees" a similar right.

In reality, Section 1, Sixth and Section 2, Second are not concerned with the *manner* in which bargaining is conducted, but solely with the right of the parties to be represented by representatives of their own choice. In the present case, for example, the Petitioners have chosen to be represented by the National Railway Labor Conference and during the separate mediation sessions between the General Chairman of the Respondent and the representatives of two of the Petitioners (the Atlantic Coast Line Railroad and the Boston and Maine), the railroads included as part of their bargaining teams a representative of the NRLC. (JA 258; 287) The railroads had such right and no objection to such representation was made by either General Chairman.

The distinction between the *manner* in which bargaining occurs and a party's right to be represented by representatives of its own choosing was recently emphasized by the Court of Appeals for the Sixth Circuit. That Court held that a union had the right to withdraw from a multiemployer bargaining unit but that,

> "After the withdrawal in the present case, each publisher would of course still have the right to be represented in separate bargaining by the [multiemployer] Association." *Detroit Newspaper Publishers Assn.* v. *N. L. R. B.*, 372 F. 2d 569 at 572 (6th Cir. 1967).

The Petitioners further argue that Section 2, First of the Act (45 U.S.C. § 152, First) supports their position that national handling can be required of *any* dispute so long as there are similar notices outstanding on a substantial number of railroads. Section 2, First provides:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Thus, the Petitioners would have this Court hold that national handling of every dispute can be required on the basis that a failure to do so is a failure "to exert every reasonable effort" to resolve the dispute. The Court of Appeals rejected this contention, stating (App. to petition, at 25a):

> "The procedures of the Act are purposefully long and drawn out to afford the maximum inducement to peaceful settlement, but the Act does not require efforts clearly at war with reality."

We, too, cannot believe that the Railway Labor Act was intended to foster exercises in futility and precipitate national crises. We cannot believe that Congress intended that parties be submitted to the time, expense, and burden of taking every dispute, which happens to be pending on a number of railroads, to national handling even though all parties know in advance that national handling of such issue has never before worked, will not now settle the dispute, and in

all probability will create a national crisis requiring Congressional intervention.

But there is even a greater danger involved in the Petitioners' thesis. The Petitioners are well aware that in every dispute in which the parties know that national handling will result, the chances that an agreement will result on the local properties during the negotiations prior to national handling approach zero. Such local meetings almost always are perfunctory and entail little more than an agreement of the parties to submit the dispute to their national representatives.

Thus, in situations involving issues such as crew consist, in which every expert body that has ever considered the matter has expressed the opinion that "a national prescription of crew size would be wholly unrealistic"[8] and that local negotiations promise the most encouraging likelihood for agreements, the only hope for agreement would be lost by requiring national handling. Surely it would be a perversion of the Congressional intent to construe the provision requiring parties "to exert every reasonable effort" to resolve disputes in such a way as to render agreement impossible. Yet this precisely is what Petitioners would have this Court hold.

The two cases cited by Petitioners (Pet. at 34) as allegedly supporting their position do no such thing. In *California* v. *Taylor,* 353 U.S. 553 (1957), this Court held that the Railway Labor Act applies to a State-owned railroad. That case had nothing whatsoever to do with the issue here. In *Kennedy* v. *Long Island R.R.,* 211 F. Supp. 478 (S.D.N.Y., 1962), the

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[8] *Railroads* v. *Operating Brotherhoods, Opinion of the Neutral Members* [of Arbitration Board No. 282], 41 Lab. Arb. 680, at 694.

issue involved the legality of the railroads' insurance program pursuant to which a struck railroad would be entitled to funds during the strike. Even a cursory reading of that case shows that it is not authority for the proposition that a party can be required to engage in national handling under the Railway Labor Act. Indeed, such a suggestion was rejected by the Court in *Kennedy*. Thus, the Court stated (at 488):

> ". . . The Long Island's right to insurance payments in case of work stoppage covered by its policy was in no way dependent upon the popularity of the Long Island's bargaining position with other railroads.
>
> "*The record shows that, at no time, was anyone but the Long Island conducting bargaining through its own officers and for itself alone.*" (Emphasis added.)

It is clear that the Court in *Kennedy* held the bargaining lawful not because national handling can be required over the objection of a party but because there was *no* national handling of the dispute.

In summary, not one of the arguments raised by Petitioners is worthy of serious consideration and no further review of the decision of the Court below is warranted.

In the Courts below Respondent took the position that national handling is never required. The Court below held that it is not required on the issue of crew consist, an issue on which national handling has *never* resulted in agreement and has led to national crisis. The decision of the District Court was so clearly at war with the Railway Labor Act and with reality, and was so likely to lead to repeated crises, that the

Solicitor General filed a brief amicus curiae, urging reversal, because of his belief that the District Court decision was "inimical both to the public interest and to the stated purpose of the Railway Labor Act." The Court of Appeals reversed.

The decision of the Court below, that national handling of a dispute is not necessarily mandatory under the Railway Labor Act, is the only judicial decision on the subject. The reason for the absence of judicial precedents on the issue is not because the question never arose in the past. On the contrary, there have been many instances in which one of the parties has refused to bargain a dispute on a national basis when the other side requested it so to do. The simple truth of the matter is that no prior litigation ever arose because never before this case has any party subject to the Railway Labor Act sought to coerce another party through judicial fiat to bargain on a national basis when such other party desired to bargain on a single employer basis.

The following is only one illustration of the fact that the *railroads* always heretofore have understood and taken the position that national handling of a dispute, even where similar notices are outstanding on a substantial number of railroads, results from *agreement* of each of the parties to the dispute, and that absent such agreement any of the parties may refuse to join in national handling of any dispute.

In early February 1951, seventeen nonoperating unions served uniform Section 6 notices for a union shop on all the railroads on which they were representatives, and asked for national handling. (JA 78) The railroads *refused* national handling and direct

negotiations were confined to individual railroads. (JA 114) When the disputes reached mediation, the National Mediation Board attempted to induce national handling in mediation by scheduling mediation on all the railroads for the same time and the same place in the hope that the railroads would appoint one committee to represent them all. It failed. The railroads refused to appoint a single committee.

The dispute eventually went before an Emergency Board (No. 98) which was invoked by the President of the United States acting under Section 10 of the Railway Labor Act (45 U.S.C. § 160). The Emergency Board recommended that the railroads negotiate on a national basis. The railroads still refused. The dispute was ultimately settled by most of the Eastern railroads as a group and on the rest of the country's railroads one by one.[9]

During the course of the proceedings before the Emergency Board, J. W. Oram, now Chairman of the Eastern Carriers' Committee and a member of the NRLC, made the following statement of the railroads'

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[9] The Petitioners argue that Respondent's position here that national handling cannot be required is inconsistent with the position taken by the labor organizations before Emergency Board No. 98. This argument is erroneous. The unions' position was that the Emergency Board in fulfilling its task under Section 10 of the Act to "investigate and report" on the dispute should *recommend* that the dispute be handled on a national basis. The unions never took the position that there was a *legal requirement* that parties engage in national handling. If the unions believed that there was such requirement, such contention would have been made in a court to compel the railroads to engage in national handling and not before an Emergency Board that has no power to require any of the parties to do anything.

position on the issue of whether national handling of a dispute is mandatory. He stated (JA 395-396):

> "Well, the fact is that [issues] have been negotiated on a national basis where the carriers and the employees have both agreed to form conference committees to handle them on a concerted basis, but the mere fact that that has been done in the past does not establish, in my opinion, any custom which would preclude the contrary course of action. *It is entirely dependent upon whether the respective parties are willing to form conference committees to handle it on a concerted basis.*" (Emphasis added.)

We submit that the history of national handling in the railroad industry does not establish the foundation upon which the Respondent can be required to engage in such bargaining over any issue, and certainly not of an issue which has shown itself to be unsuited for national handling.

IV. Assuming a past history of national handling of crew-consist issues, the Respondent's withdrawal from national handling was lawful.

The Court below found that national handling of crew consist was not the practice and could not be required. Accordingly, the Court never reached the question of whether, assuming a past history of national handling of crew-consist issues, the Respondent's withdrawal from national handling was lawful.

The facts established that the General Chairmen of Respondent, at the earliest opportunity, stated to each of the Petitioners, their unqualified refusal to negotiate the crew-consist proposals on a national basis. The Section 6 crew-consist notices, served by the several General Chairmen of the Respondent in June and July, 1965, were served on the separate railroads and requested that negotiations on the notices commence

on the local properties. (JA 26-27) In each case, the particular railroad suggested to the General Chairman that the dispute be submitted to national handling if agreement could not be reached on the property and in each case the General Chairman immediately stated his opposition to national handling and reaffirmed his intention to negotiate the dispute on the local property with the intent of entering into local agreements. (JA 394-395; 433) National handling of the crew-consist disputes never commenced. A year and a half before the service of the Section 6 notices here involved the Respondent made a public pronouncement that it would not again engage in national handling of crew-consist, and the railroads knew of that pronouncement. (JA 308-310; 136-137) And a year before the service of the Section 6 notices the Respondent in convention assembled adopted a resolution that it would not again engage in national handling of crew consist. (JA 415) Accordingly, it is overwhelmingly clear that, at the time the General Chairmen served the Section 6 crew-consist notices in June and July 1965, each was determined that bargaining proceed on a single-carrier basis and each had made such determination clear to the railroad involved.

The right of a union to withdraw from national handling has now been recognized by the National Labor Relations Board and by the Courts of Appeals for the Second and Sixth Circuits and there is no decision to the contrary.

In the Second Circuit case, *Publishers' Assn. of New York City* v. *N.L.R.B.*, 364 F. 2d 293 (1966), *cert. den.* 385 U.S. 971 (1966), a union had given timely and unequivocal notice to each of the members of an association that it no longer desired to bargain on a

multiemployer basis and desired to bargain with each member of the association separately. *The multiemployer unit had been in existence for more than 50 years.* The position of the union was sustained both by the N.L.R.B. and the Court of Appeals.[10]

The Court of Appeals for the Sixth Circuit reached the same result in *Detroit Newspaper Publishers Assn.* v. *N.L.R.B.*, 372 F. 2d 569 (1967). The facts are almost identical with those of the Second Circuit case except that in the *Detroit Newspaper* case the multiemployer unit had been in existence for a quarter of a century instead of half a century as in *Publishers' Assn.*

Accordingly, the Respondent's timely and unequivocal refusal to engage in national handling of the crew-consist disputes is a further basis supporting the decision of the Court below and is an additional reason for this Court to refuse to review that decision.

CONCLUSION

Stripped of its circumlocution, the Petitioners' basic argument comes down to the proposition that where the same or similar disputes are pending between a

[10] The Petitioners seek to undermine the holding of *Publishers' Assn.* on the ground that that decision was based on the Court's belief that the employers could resort to a lockout if one of the employers was struck and that since it is doubtful that a lockout in the railroad industry is lawful, the decision is not in point. This assertion is directly contrary to the opinion rendered by the Court and the concurring opinion. In both opinions it was made clear that a consideration of the "potential effectiveness of economic weapons" was not a factor in determining whether a union could withdraw from multiemployer bargaining. The similar principle was enunciated by this Court in *N.L.R.B.* v. *Brown*, 380 U.S. 278, 283 (1965) and in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 317-318 (1965).

railroad union and a substantial number of railroads, it is unlawful for the union to progress the resolution of the disputes in any manner that will not lead to a national emergency if agreement is not reached. It is difficult to believe that it is seriously urged that the Railway Labor Act intended such result.

The petition for certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 883

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v.

BROTHERHOOD OF RAILROAD TRAINMEN, *Respondent.*

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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We believe we have demonstrated in the petition that the issues as to whether, and in what circumstances, multi-employer bargaining ("national handling") may be required under the Railway Labor Act are important and that the decision below with respect to those issues is erroneous. Respondent does not deny that the issues are important both in terms of the immediate case and in terms of the future administration of the Railway Labor Act. Respondent does contend that the decision below is correct (Opposition, at 15-23), but it cites no authority for its position in that regard and there is none. In these circumstances, we submit that this Court should decide the important issues thus presented upon the basis of full briefs and oral argument.

Apparently in recognition of the doubtful nature of the

decision below with respect to multi-employer bargaining under the Railway Labor Act, respondent in its Opposition primarily relies upon contentions which were rejected by that court. We shall show that those contentions are without substance, but even if it were otherwise that would not detract from the need for review of the decision below by this Court. That decision was based upon the lower court's ruling that multi-employer bargaining is not required by the Railway Labor Act under the circumstances, which ruling will remain as the latest interpretation of the Railway Labor Act in that regard unless reviewed by this Court. If the court below may also have erred with respect to other substantial issues, as respondent contends, the need for review by this Court becomes even more apparent. Any such errors should be corrected, just as should the error with respect to the circumstances in which multi-employer bargaining is required by the Railway Labor Act. In fact, however, the court below did not err in rejecting respondent's contentions.

1. Respondent's first such contention (Opposition, at 10-13) is that petitioners were barred by the doctrine of *res judicata* from raising the multi-employer bargaining issues in this case. In the courts below, respondent based its *res judicata* contention upon an argument that petitioners should have raised these issues in a motion for supplemental relief filed on April 12, 1966 in *Akron & Barberton Belt Railroad Company* v. *Brotherhood of Railroad Trainmen*, 254 F. Supp. 306 (D. D.C., 1966), affirmed in part and reversed in part, 55 CCH Labor Cases ¶ 11,912, 56 CCH Labor Cases ¶ 12,095 (D.C. Cir., 1967), petitions for certiorari pending, Nos. 861, 862, 863. But, as the court below stated in rejecting that contention (Pet., App. B, at 22a-23a):

> "The carriers' motion for supplemental relief was based on the District Court's reservation of jurisdiction

> to construe and effectuate its judgment pronouncing the 1965 notices premature. The carriers sought a declaration that genuine conferences had not yet taken place. They did not have an obligation at that time to expand the relief they were seeking, even though the BRT was on record as opposing the demand for national handling, for this demand by the carriers was conditioned on the failure of local conferences, and it was not yet clear that genuine, good faith local negotiations had been tried and exhausted. Added to the lack of ripeness at that time, there is a serious question about the propriety of introducing this issue in a motion for relief at the foot of the earlier decree, which was directed at very different questions. In these circumstances, we decline to dispose of the case on *res judicata* grounds."

In short, the issue raised on the motion for supplemental relief in the *Akron & Barberton Belt* case was whether the initial conferences on the individual properties with respect to the Section 6 notices served in 1965 had to be held after the expiration of Award 282, in view of the ruling by the District Court that such notices were premature and did not become effective until January 26, 1966—the day after the expiration of Award 282. Under the established practice in the railroad industry, national handling does not take place until after the initial conferences on the individual properties have been had (and then only if the dispute is not settled in such conferences). JA 72-73, 190. Mr. Luna, respondent's president, was among those who so testified (JA 208-209), and respondent so admitted in its Answer to paragraph 5 of the Complaint (JA 3-4, 35-36). Thus, the carriers requested national handling only in the event the dispute was not settled in the initial conferences on the individual properties. JA 11-12, 29-30, 39-40. Since the

initial conferences had not taken place when the motion for supplemental relief was filed in the *Akron & Barberton Belt* case, there could be no certainty that national handling would be refused (or that the dispute would not be settled in the initial conferences), so that no concrete issue with respect to national handling existed at that time to present to the court.

Moreover, the motion for supplemental relief was filed pursuant to a provision in the judgment in the *Akron & Barberton Belt* case reserving "jurisdiction for the purpose of enabling any of the parties to this proceeding . . . to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this Judgment." See the Joint Appendix in Nos. 20,229 and 20,249 below, which is part of the record before this Court in Nos. 861, 862 and 863, at page 190. The issues raised in the motion involved the interpretation and enforcement of a provision in that judgment declaring the 1965 Section 6 notices to be premature and the service of such notices to be effective only after the expiration of Award 282. *Id.*, at 185-191. The national handling issues, on the other hand, are not dependent in any way upon the interpretation or enforcement of that judgment. Consequently, even if those issues had existed in concrete form at the time they could not appropriately have been raised in the motion for supplemental relief.

Respondent does not contend in this Court that the court below erred in rejecting the *res judicata* contention on these grounds. Rather, as we understand its argument, respondent now contends that the court below actually decided the national handling issues adversely to petitioners in the *Akron & Barberton Belt* case. Since those issues were not raised in that case, we think it obvious that they were not

decided therein, and the court below plainly did not understand them to have been so decided.

In the *Akron & Barberton Belt* case, the Court of Appeals did reverse the holding by the District Court that the 1965 Section 6 notices were premature so that the initial conferences had to be held after those notices became effective following expiration of the Award. The carriers have requested this Court to review that holding, in No. 863. In the course of so holding, the Court of Appeals stated that the "carriers have forsaken their right to insist on conferences" by reason of their refusal to bargain over the Section 6 notices prior to expiration of the Award. See Appendix E to the Petition in No. 863, at 54a. But such initial conferences merely commence the procedures provided by the Railway Labor Act for the resolution of major disputes created by Section 6 notices, they do not exhaust those procedures. The Act also requires mediation by the National Mediation Board, a proffer of voluntary arbitration and, in the discretion of the President, an investigation by an emergency board. 45 U.S.C. §§155-160. See, *e.g., Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 724-725 (1945). As we have related, it is in the course of such further procedures, rather than in the initial conferences, that national handling normally occurs and was requested here. The Court of Appeals did not hold or suggest, in the *Akron & Barberton Belt* case, "that *no* further negotiations, of any kind, were required on these Section 6 notices," as respondent states (Opposition, at 13). Rather, that court stated that where the initial conferences are "frustrated, one side to the dispute can move to the next tier of procedures;" *i.e.,* mediation by the National Mediation Board. See Appendix E to Petition in No. 863, at 54a. Of course, the purpose of such mediation is to aid the parties in their further negotiations. We note, moreover, that the initial

conferences on the individual properties did take place between petitioners and respondent following expiration of the Award, whether or not respondent could have elected to proceed directly to mediation. Respondent so concedes (Opposition, at 5-6).

2. Respondent next contends (Opposition, at 13-14) that petitioners are estopped from raising the national handling issues, apparently on the ground that they did not "object to the National Mediation Board's assertion of jurisdiction to mediate the separate disputes." To the contrary, petitioners and the other carriers asserted their view in the very telegram to which respondent refers (Opposition, at 14; JA 396-397) that national handling of the dispute is required and should be had, after the initial conferences on the individual properties failed to resolve the dispute. This is conceded by respondent in its Statement of the Case (Opposition, at 6), where it notes that the carriers' representative, in that telegram, "stated that mediation of all the crew-consist disputes should be handled on a national basis . . . ." As we have noted in the petition (fn. 7, at 10), the National Mediation Board sought to persuade respondent to agree to national negotiations, and arranged for a series of "test negotiations" whereby mediation would be had on several carriers with the understanding that the national representatives of the parties would meet thereafter and attempt to settle the entire dispute, which understanding was frustrated when respondent's president subsequently refused to attend such a meeting. In view of these facts, it is not surprising that the Court of Appeals deemed an express discussion of respondent's estoppel argument to be unnecessary.

3. Respondent's argument (Opposition, at 15-23) in support of the holding below that multi-employer bargaining is not required by the Railway Labor Act is refuted, we be-

lieve, at pp. 29-39 of the petition. We think it obvious from their face that Section 1 Sixth and Section 2 Second are concerned "with the *manner* in which bargaining is conducted," as well as "with the right of the parties to be represented by representatives of their own choice." See Opposition, at 17. Moreover, as we note in the petition (p. 30), the right of the carriers interested in a dispute to designate a joint representative to bargain on their behalf would be virtually nullified if a union may insist that the joint representative bargain on behalf of only one carrier at a time rather than behalf of all the carriers he jointly represents, as respondent contends may be done. The *Detroit Newspaper* case, to which respondent refers (Opposition, at 17), arose under the Labor-Management Relations Act, which does not contain a provision similar to those in Sections 1 Sixth and 2 Second of the Railway Labor Act whereby the employers are given an express right to designate a joint representative to bargain jointly on behalf of all of them.

It is not true, of course, that crew-consist disputes have never been disposed of through national handling, as respondent asserts (Opposition, at 20). The record discloses, as we note in the petition (pp. 9, 37-38), that such disputes were successfully disposed of by agreement with respect to Section 6 notices served in 1941, 1944, 1945, 1947 and 1956, and such a dispute was disposed of pursuant to P.L. 88-108 with respect to the 1959-1960 Section 6 notices. Respondent's assertion (Opposition, at 21) that "there have been many instances in which one of the parties has refused to bargain a dispute on a national basis when the other side requested it so to do" also is contrary to the record in this case,[1] although such instances may well become frequent in

[1] Respondent's purported "illustration" (Opposition, at 21-23) of those "many instances"—the so-called Union Shop Case—is the only instance shown by the record in which the railroads generally took the position that national handling was not required. As is shown in the petition (pp.

the future, if the decision below is allowed to stand. See the petition, at 8-9.

4. In addition to its contention that the court below correctly held that multi-employer bargaining over the 1965 Section 6 notices is not required for the reasons stated by that court in its opinion, respondent contends that it had lawfully withdrawn from such bargaining (Opposition, at 23-25). In our view, the position of the National Labor Relations Board that any obligation to engage in multi-employer bargaining under the Labor-Management Relations Act may be terminated by a timely and unequivocal withdrawal from such bargaining is not valid under the Railway Labor Act, whatever may be its validity under the Labor-Management Relations Act. But even if such withdrawals should be permitted under the Railway Labor Act, respondent did not withdraw from national handling in either a timely or an unequivocal fashion, as we note in the petition (pp. 33-34). It did not notify the carriers of such a withdrawal in its Section 6 notices (JA 26-28), and the "public pronouncement" some year and a half earlier (Opposition, at 24) consisted of an item in respondent's newspaper and a resolution of its national convention. Under the Labor-Management Relations Act, adequate "written" notice is required. *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958). Moreover, respondent did not unequivocally "withdraw" from all national handling, but continued to participate in national handling of other issues where that method of bargaining was deemed to be more

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25-26, 35), Emergency Board No. 98 agreed with the contrary argument by the unions involved in that dispute, and the eastern carriers then entered into a concerted agreement which formed the pattern for separate agreements entered into by the other carriers (Pet., fn. 5, at 9). On one other occasion, the carriers were persuaded by the National Mediation Board to participate in national handling after initially refusing to do so (Pet., fn. 5, at 9). Prior to the instant dispute, no union refused to participate in national handling when requested to do so (Pet., at 8-9).

favorable to respondent (JA 73-75, 80-81, 223-225, 234-236, 387-388).

5. For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

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